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Presidential Documents

Title 3—

The President

Proclamation 8750 of November 1, 2011

Establishment of the Fort Monroe National Monument

By the President of the United States of America

A Proclamation

Known first as ''The Gibraltar of the Chesapeake'' and later as ''Freedom's Fortress,'' Fort Monroe on Old Point Comfort in Virginia has a storied history in the defense of our Nation and the struggle for freedom.

Fort Monroe, designed by Simon Bernard and built of stone and brick between 1819 and 1834 in part by enslaved labor, is the largest of the Third System of fortifications in the United States. It has been a bastion of defense of the Chesapeake Bay, a stronghold of the Union Army surrounded by the Confederacy, a place of freedom for the enslaved, and the imprisonment site of Chief Blackhawk and the President of the Confederacy, Jefferson Davis. It served as the U.S. Army's Coastal Defense Artillery School during the 19th and 20th centuries, and most recently, as headquarters of the U.S. Army's Training and Doctrine Command.

Old Point Comfort in present day Hampton, Virginia, was originally named ''Pointe Comfort'' by Captain John Smith in 1607 when the first English colonists came to America. It was here that the settlers of Jamestown established Fort Algernon in 1609. After Fort Algernon's destruction by fire in 1612, successive English fortifications were built, testifying to the location's continuing strategic value. The first enslaved Africans in England's colonies in America were brought to this peninsula on a ship flying the Dutch flag in 1619, beginning a long ignoble period of slavery in the colonies and, later, this Nation. Two hundred and forty-two years later, Fort Monroe became a place of refuge for those later generations escaping enslavement.

During the Civil War, Fort Monroe stood as a foremost Union outpost in the midst of the Confederacy and remained under Union Army control during the entire conflict. The Fort was the site of General Benjamin Butler's ''Contraband Decision'' in 1861, which provided a pathway to freedom for thousands of enslaved people during the Civil War and served as a forerunner of President Abraham Lincoln's Emancipation Proclamation of 1863. Thus, Old Point Comfort marks both the beginning and end of slavery in our Nation. The Fort played critical roles as the springboard for General George B. McClellan's Peninsula Campaign in 1862 and as a crucial supply base for the siege of Petersburg by Union forces under General Ulysses S. Grant in 1864 and 1865. After the surrender of the Confederacy, Confederate President Jefferson Davis was transferred to Fort Monroe and remained imprisoned there for 2 years.

Fort Monroe is the third oldest United States Army post in continuous active service. It was designated a National Historic Landmark in 1960 and it is listed on the National Register of Historic Places. It provides an excellent opportunity for the public to observe and understand Chesapeake Bay and Civil War history. At the northern end of the North Beach area lies the only undeveloped shoreline remaining on Old Point Comfort, providing modern-day visitors a sense of what earlier people saw when they arrived in the New World. The North Beach area also includes coastal defensive batteries, including Batteries DeRussy and Church, which were used from the 19th Century to World War II.

WHEREAS section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431) (the ''Antiquities Act''), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected;

WHEREAS the 2005 Defense Base Closure and Realignment Commission recommended that Fort Monroe cease to be used as an Army installation, and pursuant to the Defense Base Closure and Realignment Act of 1990 (Public Law 101–510), Fort Monroe closed on September 15, 2011;

WHEREAS the Governor of the Commonwealth of Virginia, Members of Congress, the Fort Monroe Authority, the City of Hampton, Virginia, and other surrounding counties and cities have expressed support for establishing a unit of the National Park System at Fort Monroe;

WHEREAS it is in the public interest to preserve Fort Monroe, portions of Old Point Comfort, and certain lands and buildings necessary for the care and management of the Fort and Point as the Fort Monroe National Monument;

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by the authority vested in me by section 2 of the Antiquities Act, hereby proclaim that all lands and interests in lands owned or controlled by the Government of the United States within the boundaries described on the accompanying map, which is attached to and forms a part of this proclamation, are hereby set apart and reserved as the Fort Monroe National Monument (monument) for the purpose of protecting the objects identified above. The reserved Federal lands and interests in lands encompass approximately 325.21 acres, together with appurtenant easements for all necessary purposes, which is the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, leasing, or other disposition under the public land laws, including withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing. Lands and interests in lands within the monument's boundaries not owned or controlled by the United States shall be reserved as part of the monument upon acquisition of ownership or control by the United States.

The lands and interests in lands within the monument's boundaries, except for the Old Point Comfort Lighthouse, are currently managed by the Secretary of the Army. The Secretaries of the Army and the Interior shall enter into a memorandum of agreement that identifies and assigns the responsibilities of each agency related to such lands and interests in lands, the implementing actions required of each agency, the processes for transferring administrative jurisdiction over such lands and interests in lands to the Secretary of the Interior, and the processes for resolving interagency disputes. After issuance of this proclamation, the Secretary of the Army, in consultation with the Secretary of the Interior, acting through the National Park Service, will continue to manage the lands and interests in lands within the monument boundaries, to the extent they remain in the ownership or control of the Government of the United States, until the transfer to the Secretary of the Interior is completed in accordance with the memorandum of agreement. The Secretary of the Interior shall then manage the monument through the National Park Service, pursuant to applicable legal authorities, consistent with the purposes and provisions of this proclamation, and in accordance with the memorandum of agreement.

The Old Point Comfort Lighthouse shall continue to be managed by the Secretary of Homeland Security. Not later than 1 year after the date of this proclamation, the Secretary of the Interior and the Secretary of Homeland Security shall enter into an interagency agreement that, to the extent requested by the United States Coast Guard, provides for appropriate National Park Service interpretation of the Old Point Comfort Lighthouse for the public and for technical or financial assistance by the National Park Service for building treatment and other preservation activities. Nothing in this proclamation shall limit or interfere with the authority of the Secretary of Homeland Security to use the Old Point Comfort Lighthouse for navigational or national security purposes.

For the purpose of preserving, restoring, and enhancing the public visitation and appreciation of the monument, the Secretary of the Interior shall prepare a management plan for the monument within 3 years of the date of this proclamation. The management plan will ensure that the monument fulfill the following purposes for the benefit of present and future generations: (1) to preserve historic, natural, and recreational resources; (2) to provide land- and water-based recreational opportunities; and (3) to communicate the historical significance of the monument as described above. The management plan shall, among other provisions, set forth the desired relationship of the monument to other related resources, programs, and organizations in the Hampton area and other locations, provide for maximum public involvement in its development, and identify steps to be taken to provide interpretive opportunities for the entirety of the Fort Monroe National Historic Landmark and related sites in Hampton, Virginia. In developing the management plan, the Secretary of the Interior shall consider the Fort Monroe Reuse Plan, the Fort Monroe Programmatic Agreement dated April 27, 2009 (and any amendments to the agreement), and the Commonwealth of Virginia Fort Monroe Authority Act. Further, to the extent authorized by law, the Secretary of the Interior shall promulgate any additional regulations needed for the proper care and management of the monument.

The establishment of this monument is subject to valid existing rights. To the extent that the Commonwealth of Virginia holds any reversionary rights in any Federal lands or interests in lands within the boundaries of this monument, those rights are preserved and may operate or be exercised in due course without affecting the existence or designated boundaries of the monument. The Governor of the Commonwealth of Virginia and the Fort Monroe Authority, which would have responsibility for such lands and interests in lands upon their reversion, have agreed in principle to then relinquish to the United States ownership or control of those lands and interests in lands, as stated in the Governor's letter agreement of September 9, 2011. The Secretary of the Interior shall accept the relinquishment of such lands and interests in lands on behalf of the Government of the United States, at which point such lands and interests in lands, reserved pursuant to this proclamation, shall be managed by the Secretary of the Interior, through the National Park Service, pursuant to applicable legal authorities, consistent with the purposes and provisions of this proclamation, and in accordance with the memorandum of agreement.

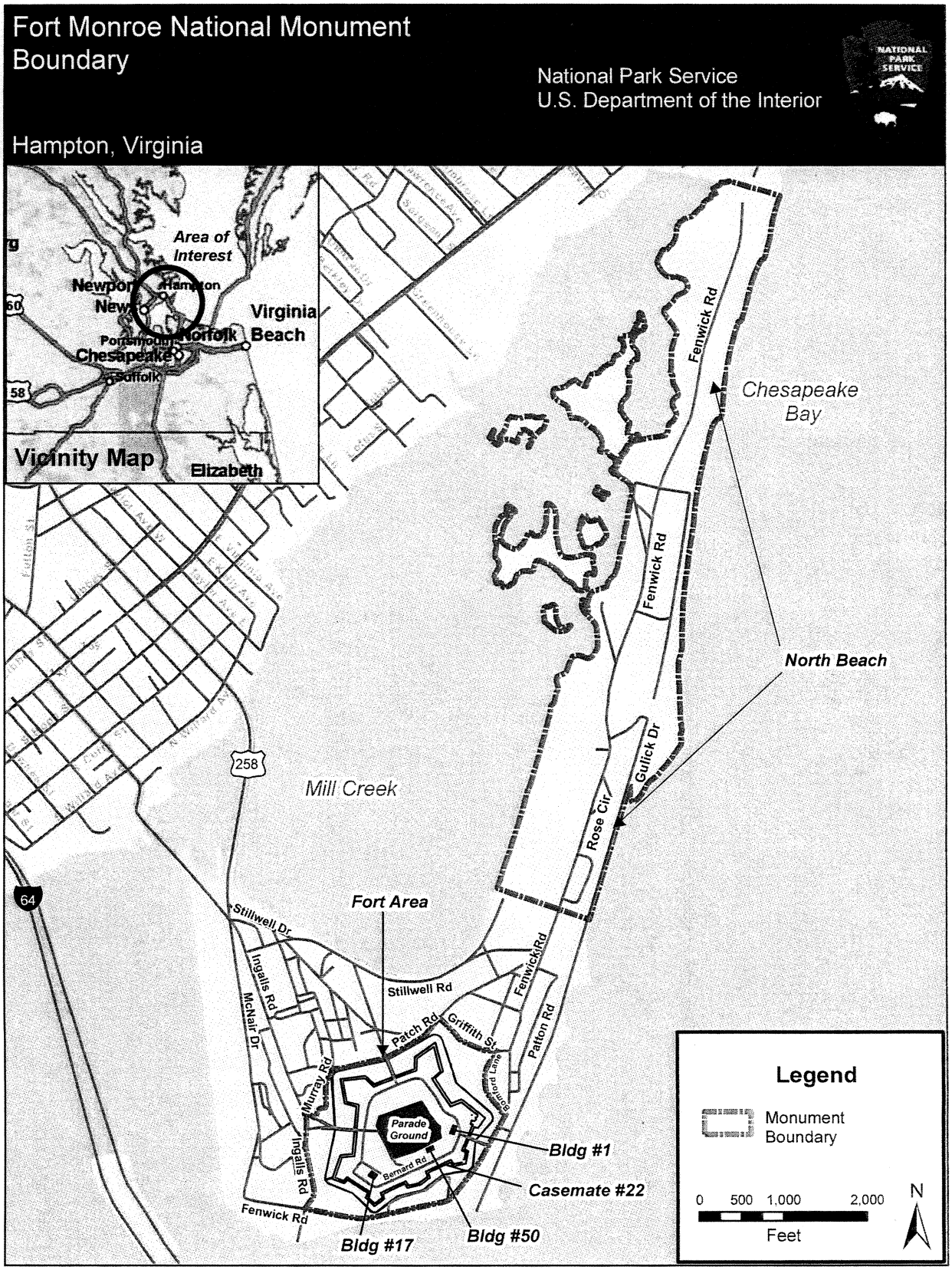
Nothing in this proclamation shall affect the responsibilities of the Department of the Army under applicable environmental laws, including the remediation of hazardous substances or munitions and explosives of concern within the monument boundaries; nor affect the Department of the Army's statutory authority to control public access or statutory responsibility to make other measures for environmental remediation, monitoring, security, safety or emergency preparedness purposes; nor affect any Department of the Army activities on lands not included within the monument.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of November in the year of our Lord two thousand eleven, and of the Independence of the United States of America the two hundred and thirty-sixth.

Billing code 3295–F2–P



[FR Doc. 2011–28926
Filed 11–4–11; 8:45 am]
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Rules and Regulations

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 530, 531, and 536

RIN 3206–AM43

Pay in Nonforeign Areas

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing final regulations on certain pay administration rules dealing with employees in nonforeign areas outside the 48 contiguous States. We are revising provisions related to special rates, locality rates, and retained rates. Some of the revisions are necessary to address the effects of implementing the Non-Foreign Area Retirement Equity Assurance Act of 2009, while others are to improve the administration of special rates.

DATES: *Effective Date:* December 7, 2011.

FOR FURTHER INFORMATION CONTACT: Carey Jones by telephone at (202) 606–2858; by fax at (202) 606–0824; or by email at *pay-leave-policy@opm.gov.*

SUPPLEMENTARY INFORMATION: On August 1, 2011, the U.S. Office of Personnel Management (OPM) published proposed regulations (76 FR 45710) to revise certain pay administration rules for employees in ''nonforeign areas,'' which include Alaska, Hawaii, Guam, Puerto Rico, the Virgin Islands, and certain other areas listed in 5 CFR 591.205. Some of the revisions are necessary to address the effects of implementing the Non-Foreign Area Retirement Equity Assurance Act of 2009 (NAREAA), as contained in subtitle B of title XIX of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84, October 28, 2009), while others are to improve the administration of special rates.

The 45-day comment period ended on September 15, 2011. During the comment period, we received comments from three Senators, one agency, and six individuals. This supplementary information addresses the comments we received. The agency concurred with OPM's proposed changes as written.

Special Rates

In the supplementary information accompanying the proposed regulations, we stated that certain provisions of NAREAA required additional increases in special rate schedules to levels beyond what may be justified to prevent significant recruitment or retention difficulties. We stated that, accordingly, OPM may consider reducing special rate schedules in nonforeign areas. We proposed to provide OPM with discretionary authority to establish a separate special rate schedule that temporarily maintains the higher special rates for current employees covered by a given special rate schedule before the effective date of the schedule reduction. This means that future hires would be covered by a lower special rate schedule established consistent with labor market conditions while current employees would have ''grandfather'' coverage under a higher special rate schedule that would provide pay protection, but would be phased out over time.

The Senators and one individual were concerned about the proposal. Specifically, the individual does not want OPM to phase out any special rates. The Senators were concerned that OPM has decided to eliminate additional adjustments for special rate employees and by the suggestion that the adjusted rates may be higher than justified without supporting analysis. The Senators were also concerned that the proposal could lead to losses in take-home pay if cost-of-living allowance (COLA) reductions are not adequately considered and the phase-out is done too quickly. (As locality pay increases, payable COLA rates must be reduced as specified in section 1912(b) of NAREAA. As a consequence, covered employees may receive both locality pay and a reduced COLA for a number of years, until the applicable COLA rate is reduced to zero.) They stated that pay reductions could impair agencies' recruitment and retention efforts and recommended that any decreases in special rates be done gradually in order to protect pay.

During the January 2010–January 2012 transition period, additional adjustments are being added to the original special rates to compensate for COLA reductions, as required by NAREAA. The original special rates without the NAREAA additional adjustments were set at levels necessary to address recruitment and/or retention difficulties. We note that most of the special rate schedules established in nonforeign areas were derived from nationwide or worldwide schedules for which the special rates were set without consideration of the fact that employees in the nonforeign areas would receive COLA on top of special rates. Thus, the total pay rates may have been beyond what was necessary to prevent significant recruitment or retention problems in the nonforeign areas. Accordingly, as part of the annual review of special rates, we have asked agencies to conduct reviews to determine whether they need the special rates set at a level above the original special rates, taking into consideration the remaining COLA that will be paid on top of the special rates. See CPM 2011–11, issued July 8, 2011, at *http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=3995.* An agency finding that reducing a special rate schedule would cause significant recruitment or retention problems would merit special consideration by OPM and may result in no schedule reduction.

OPM has not yet determined how it will adjust special rates for employees in nonforeign areas after January 1, 2012, because we are waiting for agencies to complete their reviews of special rates that apply to their employees. OPM will announce its decisions resulting from the annual review of special rates in a memorandum that is typically issued in December. Under 5 U.S.C. 1103(b)(4), the Director of OPM is not required to publish in the **Federal Register** a notice of the establishment or adjustment of any schedules or rates of basic pay or allowances under subpart D of part III of title 5.

OPM is adopting as final the proposed change providing the discretionary authority to establish a separate special rate schedule that temporarily maintains

the higher special rates for employees covered by the given special rate schedule before the effective date of the schedule reduction. This is an authority OPM may or may not exercise based on agency input and the circumstances and factors OPM considers in evaluating the need for special rates in 5 CFR 530.304(b) and 530.306.

OPM is also adopting the proposal to add locality pay and nonforeign COLA as circumstances and factors OPM may consider in evaluating the need for special rates. This means that OPM can take into account any COLA reductions or locality pay increases as it is determining how to adjust special rate schedules in nonforeign areas.

Locality Rates

Another individual requested that OPM's regulations provide locality pay for employees in foreign areas. OPM does not have the authority to provide locality pay for employees in foreign areas because 5 U.S.C. 5304(f) does not cover foreign areas.

Retained Rates

A third individual was concerned that there is no provision in NAREAA allowing non-appropriated fund (NAF) employees covered by NAREAA to receive a rate exceeding the maximum of the NAF pay band. The individual asked OPM to address NAF pay issues in the regulations.

These regulations do not address NAF pay issues because OPM has the authority to regulate pay setting only for NAF employees who move to the General Schedule. We note that, under section 1918(b) of NAREAA, administrators of pay systems not administered by OPM must carry out the provisions of NAREAA consistent with OPM rules, subject to the concurrence of OPM. Thus, if there are nonforeign area employees in the NAF pay system who are covered by NAREAA and who are receiving a retained rate similar to a retained rate under 5 U.S.C. 5363, then the NAF pay system administrator should prescribe rules consistent with OPM's regulations on retained rates.

On December 27, 2010, OPM issued a memorandum (CPM 2010–23) that provided a special (more generous) rule for adjusting retained rates under 5 U.S.C. 5363 for employees in nonforeign areas receiving COLAs during the January 2010–January 2012 transition period. Without the special rule, some retained rate employees may have experienced a reduction in gross pay during the transition period because the increase in pay resulting from a retained rate adjustment may have been less than the loss in pay resulting from the COLA reduction. OPM stated in the supplementary information accompanying the proposed regulations that OPM was not proposing to continue the special rule after the transition period. OPM explained that a continuing exception to the statutory retained rate adjustment rule would not be appropriate. The NAREAA section 1918(a)(2) authority under which OPM established the special retained rate adjustment rule applies only during the transition period, when locality pay is being increased by significant amounts and there are corresponding large reductions in COLA payments.

The Senators and an individual recommended that OPM continue the special retained rate adjustment rule beyond the transition period. The Senators believed that the rule was consistent with Congressional intent to protect employees' pay. They cited the sense of Congress in section 1915(a) of NAREAA, which states: ''It is the sense of Congress that the application of this subtitle to any employee should not result in a decrease in the take home pay of that employee.'' The Senators further maintained that there is no basis for distinguishing between the transition period and the post-transition period in terms of providing employee pay protection.

While a sense of Congress does not have the effect of law, OPM has recognized that it is an expression of the general intent of Congress. OPM has taken this intent into account in implementing NAREAA, while complying with the requirements of NAREAA and other applicable law.

In NAREAA, Congress did provide for special treatment during the transition period. For example, section 1918(a)(2) gave OPM authority to enact special rules governing the adjustment of pay rates during the transition period for certain employees (including retained rate employees). Also, section 1915(b)(1) established special rules governing the adjustment of special rates during the transition period. The transition period is distinguishable from the post-transition period because locality pay is being phased in by providing large increases each year equal to one-third of the applicable locality rate, which results in correspondingly large reductions in COLA payments. This was the basis for Congress enacting special authorities for the transition period.

Since certain NAREAA provisions are applicable only to the transition period, OPM understands that the law generally intended a return to the normal pay rules after the transition period, absent a specific NAREAA provision providing otherwise. For example, OPM expects to apply the normal provisions of its special rates authority in 5 U.S.C. 5305 in making determinations regarding the adjustment of special rates after January 1, 2012, rather than rely on the formula in NAREAA section 1915(b). Likewise, OPM expects to follow the normal retained rate adjustment rules in 5 U.S.C. 5363 after the transition period. Any reduction in take-home pay would not be attributable to the application of NAREAA, but to the application of the regular pay laws.

We note that the idea of protecting take-home pay has always been problematic, since take-home pay for each individual is affected by various deductions, some of which can be controlled by the employee and some of which have nothing to do with the application of NAREAA. Also, a focus on take-home pay fails to take into account the benefits of replacing COLA with basic pay. Basic pay is used to compute retirement annuities, Government contributions towards Thrift Savings Plan accounts, life insurance benefits, and other payments and benefits.

When OPM established a more generous retained rate adjustment rule during the NAREAA transition period, it did so because analysis showed that the large reductions in COLA payments during the transition period could result in a significant reduction in a retained rate employee's gross total pay. Our analysis shows that such reductions will not occur when locality pay increases and corresponding COLA reductions are more modest. That difference does provide a basis for treating the transition period differently than the post-transition period.

It is important to remember that employees receiving a retained rate are, by definition, being paid above the regular salary range for their position. That salary range, including the maximum rate of the range that is the eventual target salary for the retained rate employee, is receiving the full pay adjustments. By design, retained rate employees receive lesser increases so that they can fall back into the normal salary range over time and be paid appropriately for their position.

The three Senators recommended that OPM use the authority in NAREAA section 1918(a)(3) to establish a more generous retained rate adjustment rule for the post-transition period. Section 1918(a)(3) provides that OPM may establish ''rules governing the establishment and adjustment of saved or retained rates for any employee whose rate of pay exceeds applicable pay limitations on the first day of the

first pay period beginning on or after January 1, 2012'' (*i.e.,* the last day of the transition period). However, this authority may be applied only to those whose rate of pay exceeds applicable pay limitations ''on'' the last day of the transition period. The regulations proposed by OPM would use this authority for two closed sets of ''grandfathered'' employees to (1) Waive the normal cap on retained rates of level IV of the Executive Schedule (EX–IV) for nonforeign area employees with a retained rate in excess of that cap at the end of the transition period and (2) allow temporary and term employees to have a retained rate established at the end of the transition period or afterwards. While we could perhaps use the section 1918(a)(3) authority to establish a more generous retained rate adjustment rule for employees who have a retained rate at the end of the transition period, we do not believe we could use this authority to apply that more generous rule to nonforeign area employees whose retained rate is created at a later date or who move to the nonforeign area at a later date with a retained rate. Thus, agencies would be required to apply a different retained rate adjustment rule to different categories of nonforeign area employees, which would raise equity concerns and pose significant administrative problems. The more generous retained rate adjustment rule for a limited category of employees would be in place until COLA was entirely eliminated, which may be many years away. We do not believe that NAREAA requires OPM to depart from the normal statutory retained rate adjustment rule for years after the transition period has ended.

As indicated by our responses above, we are not using the authority in NAREAA section 1918(a)(3) to adopt a more generous retained rate adjustment rule for certain grandfathered employees at this time; however, we will study and analyze this issue further. For General Schedule employees, OPM will use the more generous retained rate adjustment rule on January 1, 2012. The next possible application of the retained rate adjustment rule after January 2012 will be in January 2013 under current law. That gives us some time to further consider this matter.

The Senators and an individual supported OPM's proposed rule change to 5 CFR 536.310 to lift the EX–IV pay cap for employees who are receiving special rates in excess of the rate for EX–IV on January 1, 2012, that are converted to retained rates consistent with section 1913 of NAREAA. It has come to our attention that the exception to the level IV cap should apply to other employees. In the memorandum announcing the special retained rate adjustment rule to be used during the transition period, OPM stated ''the Executive Schedule level IV cap on retained rates under 5 CFR 536.306(a) does not apply to a retained rate adjusted under this special authority.'' Therefore, we are revising 5 CFR 536.310(a) to provide that a nonforeign area employee who is receiving a retained rate in excess of EX–IV on January 1, 2012, consistent with NAREAA, may continue to receive this rate until the retained rate becomes equal to or falls below the rate for EX-IV, or the employee ceases to be entitled to pay retention under § 536.308. This includes employees who are receiving special rates in excess of EX–IV on January 1, 2012, that are converted to retained rates consistent with section 1913 of NAREAA.

Biweekly Premium Pay Cap

Another individual was concerned about nonforeign area employees whose pay is limited by the biweekly cap on premium pay under 5 U.S.C. 5547(a) and 5 CFR 550.105. Specifically, the individual states that such employees who are receiving law enforcement availability pay (LEAP) under 5 U.S.C. 5545a have experienced reductions in total pay because, as the employee's locality pay increases and COLA decreases under NAREAA, the employee's LEAP is reduced so that the sum of the employee's basic pay and premium pay does not exceed the biweekly cap on premium pay. (COLA is not subject to the biweekly premium pay cap while locality pay is subject to the biweekly premium pay cap.) The individual requests that OPM use the authority in section 1918(a)(3) of NAREAA to issue regulations preventing employees subject to the biweekly premium pay limitation in nonforeign areas from experiencing reductions in total pay.

We are not adopting this recommendation. Section 1918(a)(3) provides OPM the authority to prescribe rules governing the establishment and adjustment of saved or retained rates for any employee whose rate of pay exceeds applicable pay limitations on the first day of the first pay period beginning on or after January 1, 2012. The authority is intended to apply to nonforeign area employees who have a rate in excess of applicable pay limitations on the last day of the transition period and who will have a saved or retained rate. That does not fit the premium pay situations cited by the commenter. There is no authority to prevent premium pay from being reduced as a result of the biweekly cap on premium pay. Any reduction is due to application of the longstanding premium pay cap law, not the application of NAREAA. We note that employees whose official worksites are within the continental United States may also experience reductions in their premium pay as a result of the biweekly premium pay cap when their locality pay increases.

Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and E.O. 12866.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

List of Subjects in 5 CFR Parts 530, 531 and 536

Administrative practice and procedure, Freedom of information, Government employees, Law enforcement officers, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

John Berry,

Director.

Accordingly, OPM is amending 5 CFR parts 530, 531, and 536 as follows:

PART 530—PAY RATES AND SYSTEMS (GENERAL)

■ 1. Revise the authority citation for part 530 to read as follows:

Authority: 5 U.S.C. 5305 and 5307; subpart C also issued under 5 U.S.C. 5338, sec. 4 of the Performance Management and Recognition System Termination Act of 1993 (Pub. L. 103–89), 107 Stat. 981, and sec. 1918 of Public Law 111–84, 123 Stat. 2619.

Subpart C—Special Rate Schedules for Recruitment and Retention

■ 2. In § 530.304—
■ a. Remove ''or'' at the end of paragraph (b)(3);
■ b. Redesignate paragraph (b)(4) as (b)(6);
■ c. Add new paragraphs (b)(4) and (b)(5);
■ d. Revise paragraph (c); and
■ e. Add a new paragraph (e).

The revisions and additions read as follows:

§ 530.304 Establishing or increasing special rates.

* * * * *

(b) * * *

(4) Locality pay authorized under 5 U.S.C. 5304 for the area involved;

(5) A nonforeign area cost-of-living allowance authorized under 5 U.S.C. 5941(a)(1) for the area involved; or

* * * * *

(c) In setting the level of special rates within a rate range for a category of employees, OPM will compute the special rate supplement by adding a fixed dollar amount or a fixed percentage to all GS rates within that range, except that an alternate method may be used—

(1) For grades GS–1 and GS–2, where within-grade increases vary throughout the range; and

(2) In the nonforeign areas listed in 5 CFR 591.205 for special rate schedules established before January 1, 2012.

* * * * *

(e) Using its authority in section 1918(a)(1) of the Non-Foreign Area Retirement Equity Assurance Act of 2009 in combination with its authority under 5 U.S.C. 5305, OPM may establish a separate special rate schedule for a category of employees who are in GS positions covered by a nonforeign area special rate schedule in effect on January 1, 2012, and who are employed in a nonforeign area before an OPM-specified effective date. Such a separate schedule may be established if the existing special rate schedule is being reduced. An employee's coverage under the separate special rate schedule is contingent on the employee being continuously employed in a covered GS position in the nonforeign area after the OPM-specified effective date. Such a separate special rate schedule must be designed to provide temporary pay protection and be phased out over time until all affected employees are covered under the pay schedule that would otherwise apply to the category of employees in question.

■ 3. In § 530.306—

■ a. Remove ''and'' at the end of paragraph (a)(8);

■ b. Remove the period at the end of paragraph (a)(9) and add ''; and'' in its place; and

■ c. Add a new paragraph (a)(10) to read as follows:

§ 530.306 Evaluating agency requests for new or increased special rates.

(a) * * *

(10) The level of any locality pay authorized under 5 U.S.C. 5304 and any nonforeign area cost-of-living allowance authorized under 5 U.S.C. 5941(a)(1) for the area involved.

* * * * *

■ 4. In § 530.308—

■ a. Revise paragraph (a);

■ b. Remove paragraph (b); and

■ c. Redesignate paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

The revision reads as follows:

§ 530.308 Treatment of special rate as basic pay.

* * * * *

(a) The purposes for which a locality rate is considered to be a rate of basic pay in computing other payments or benefits to the extent provided by 5 CFR 531.610, except as otherwise provided in paragraphs (b) and (c) of this section;

* * * * *

PART 531—PAY UNDER THE GENERAL SCHEDULE

■ 5. Revise the authority citation for part 531 to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Public Law 103–89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5305, 5333, 5334(a) and (b), and 7701(b)(2); Subpart D also issued under 5 U.S.C. 5335 and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305, and 5941(a); E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682; and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224.

Subpart F—Locality-Based Comparability Payment

■ 6. In § 531.610, revise paragraph (g) to read as follows:

§ 531.610 Treatment of locality rate as basic pay.

* * * * *

(g) Nonforeign area cost-of-living allowances and post differentials under 5 U.S.C. 5941 and 5 CFR part 591, subpart B;

* * * * *

PART 536—GRADE AND PAY RETENTION

■ 7. Revise the authority citation for part 536 to read as follows:

Authority: 5 U.S.C. 5361–5366; sec. 4 of the Performance Management and Recognition System Termination Act of 1993 (Pub. L. 103–89), 107 Stat. 981; § 536.301(b) also issued under 5 U.S.C. 5334(b); § 536.308 also issued under sec. 301(d)(2) of the Federal Workforce Flexibility Act of 2004 (Pub. L. 108–411), 118 Stat. 2305; § 536.310 also issued under sections 1913 and 1918 of the Non-Foreign Area Retirement Equity Assurance Act of 2009 (subtitle B of title XIX of Pub. L.111–84), 123 Stat. 2619; § 536.405 also issued under 5 U.S.C. 552, Freedom of Information Act, Public Law 92–502.

Subpart C—Pay Retention

■ 8. Add a new § 536.310 to read as follows:

§ 536.310 Exceptions for certain employees in nonforeign areas.

(a) Notwithstanding §§ 536.304(b)(3) and 536.306(a), an employee who is receiving a retained rate in excess of Executive Schedule level IV on January 1, 2012, consistent with the Non-Foreign Retirement Equity Assurance Act of 2009 (subtitle B of title XIX of Pub. L. 111–84), may continue to receive a retained rate higher than Executive Schedule level IV until—

(1) The retained rate becomes equal to or falls below Executive Schedule level IV; or

(2) The employee ceases to be entitled to pay retention under § 536.308.

(b) Notwithstanding 5 U.S.C. 5361(1) and § 536.102(b)(2), an employee who is employed on a temporary or term basis is not barred from receiving a retained rate if such employee—

(1) Is receiving a special rate above Executive Schedule level IV on January 1, 2012, and is covered by paragraph (a) of this section; or

(2) Is receiving a special rate incorporating an additional adjustment under section 1915(b)(1) of the Non-Foreign Retirement Equity Assurance Act (subtitle B of title XIX of Pub. L. 111–84) at the time the employee's special rate schedule is reduced or terminated.

[FR Doc. 2011–28742 Filed 11–4–11; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1151; Directorate Identifier 95–ANE–10–AD; Amendment 39–16855; AD 2011–23–04]

RIN 2120–AA64

Airworthiness Directives; General Electric Company (GE) CF6 Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for the engines identified above. That AD currently requires initial and repetitive visual inspections of the forward engine mount assembly side links for cracks, stripping and reapplying the Sermetel W coating on the side links at every exposure of the side link. This new AD requires those same inspections, stripping and reapplying the Sermetel W coating, and adds two part numbers

to the applicability. This AD was prompted by a review of the inspection program, which revealed that GE had omitted two affected side link part numbers from the applicability. We are issuing this AD to prevent failure of the side links and possible engine separation from the airplane.

DATES: This AD is effective December 12, 2011.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of December 12, 2011.

ADDRESSES: For service information identified in this AD, contact GE Aviation M/D Rm. 285, One Neumann Way, Cincinnati, OH 45215; *phone:* (513) 552–3272; *email: geae.aoc@ge.com.* You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call (781) 238–7125.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (*phone:* (800) 647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Tomasz Rakowski, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *phone:* (781) 238–7735; *fax:* (781) 238–7199; *email: tomasz.rakowski@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2006–12–24, amendment 39–14650 (71 FR 34807, June 16, 2006). That AD applies to the specified products. The NPRM published in the **Federal Register** on December 13, 2010 (75 FR 77570). That NPRM proposed to continue to require inspecting, stripping, and reapplying the Sermetel W coating on the side links every time one or more of the bolts attaching the side links to the fan frame front high-pressure compressor case or the bolt attaching each side link to the mount platform are removed. That NPRM also proposed to add a left-hand side link, P/N 9346M99P03 and a right-hand side link, P/N 9346M99P04, to the applicability section.

Comments

We gave the public the opportunity to participate in developing this AD. The following is the comment received and our response.

Request To Add MD–10–30F to the ''Used on But Not Limited to'' List of Airplanes

One commenter, Propulsion & Fuel Systems Design & Analysis, asked us to add the MD–10–30F to the list of airplanes in paragraph (c) of the proposed AD (75 FR 77570, December 13, 2010). The commenter states that MD–10–30F airplanes are equipped with CF6–50C2 model engines.

We agree that the AD may apply to engines installed on the MD–10–30F airplane. However, to avoid confusion, we recently changed our applicability statement and no longer list the aircraft that use the product to which an engine or propeller AD applies. We did not change the AD in response to this comment.

Editorial Change to the Applicability Paragraph (c) for Clarity

We changed paragraph (c) of the proposed AD (75 FR 77570, December 13, 2010) from ''(c) This AD applies to * * * and CF6–80A3 turbofan engines with left-hand links * * *.'' to ''(c) This AD applies to * * * and CF6–80A3 turbofan engines, including engines marked on the engine data plate as CF6–50C2–F and CF6–50C2–R, with left-hand links * * *'' This change improves clarity regarding what engines this AD applies to. This change does not change the engines that are affected by this AD; this change is editorial only.

Minor Change to the Economic Evaluation

We made a minor change to the economic analysis to include the pro-rated cost of a replacement part.

Conclusion

We reviewed the relevant data, considered the comment received and determined that air safety and the public interest require adopting the AD as proposed except for the minor editorial changes we made for clarity. These minor changes are consistent with the intent that we proposed in the NPRM (75 FR 77570, December 13, 2010) and do not add any additional burden upon the public than was already proposed in the NPRM.

Costs of Compliance

We estimate that this AD will affect 194 engines installed on airplanes of U.S. registry. We also estimate that it will take about 8 work-hours per engine to perform the actions and that the average labor rate is $85 per work-hour. We estimate that one side link assembly will fail the inspections of this AD and require replacement every 4 years at a pro-rated parts cost of $1,800 per year. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $133,720 per year.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2006–12–24, Amendment 39–14650 (71 FR 34807, June 16, 2006), and adding the following new AD:

2011–23–04 General Electric Company: Amendment 39–16855; Docket No. FAA–2010–1151; Directorate Identifier 95–ANE–10–AD.

Effective Date

(a) This airworthiness directive (AD) is effective December 12, 2011.

Affected ADs

(b) This AD supersedes AD 2006–12–24, Amendment 39–14650 (71 FR 34807, June 16, 2006).

Applicability

(c) This AD applies to General Electric (GE) CF6–45A, CF6–45A2, CF6–50A, CF6–50C, CF6–50CA, CF6–50C1, CF6–50C2, CF6–50C2B, CF6–50C2D, CF6–50E, CF6–50E1, CF6–50E2, CF6–50E2B, CF6–80A, CF6–80A1, CF6–80A2, and CF6–80A3 turbofan engines, including engines marked on the engine data plate as CF6–50C2–F and CF6–50C2–R, with left-hand side links part numbers (P/Ns) 9204M94P01, 9204M94P03, 9346M99P01, and 9346M99P03, and right-hand side links, P/Ns 9204M94P02, 9204M94P04, 9346M99P02, and 9346M99P04, installed on the forward engine mount assembly (also known as Configuration 2).

Unsafe Condition

(d) This AD results from a report that GE had omitted two affected side link part numbers from the applicability of the original AD. We are issuing this AD to include those part numbers and to prevent failure of the side links and possible engine separation from the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed at every exposure of the side link.

Inspecting and Stripping and Reapplying the Sermetel W Coating on the Side Links

(f) Inspect, strip, and reapply the Sermetel W coating on each side link at every exposure of the side link. Use the following GE service bulletins (SBs):

(1) For CF6–45/–50 series engines, use paragraphs 3.A. through 3.E. of the Accomplishment Instructions of CF6–50 S/B 72–1255, Revision 1, dated June 17, 2009.

(2) For CF6–80A series engines, use paragraphs 3.A. through 3.E. of the Accomplishment Instructions of CF6–80A S/B72–0797, Revision 1, dated June 17, 2009.

Definition of Exposure of Side Link

(g) A side link is exposed when one or more bolts that attach the side links to the fan frame-front high-pressure compressor case are removed or when the bolt attaching the side link to the mount platform is removed.

Alternative Methods of Compliance

(h) The Manager, Engine Certification Office, FAA, may approve alternative methods of compliance for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

Related Information

(i) For more information about this AD, contact Tomasz Rakowski, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *phone:* (781) 238–7735; *fax:* (781) 238–7199; *email: tomasz.rakowski@faa.gov.*

Material Incorporated by Reference

(j) You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference (IBR) under 5 U.S.C. 552(a) and 1 CFR part 51 of the following service information on the date specified:

(1) GE CF6–50 S/B 72–1255, Revision 1, dated June 17, 2009, approved for IBR December 12, 2011.

(2) GE CF6–80A S/B 72–0797, Revision 1, dated June 17, 2009, approved for IBR December 12, 2011.

(3) For service information identified in this AD, contact GE Aviation M/D Rm. 285, One Neumann Way, Cincinnati, OH 45215; *phone:* (513) 552–3272; *email: geae.aoc@ge.com.*

(4) You may review copies of the service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call (781) 238–7125.

(5) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Burlington, Massachusetts, on October 26, 2011.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2011–28671 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0683; Directorate Identifier 2010–NE–25–AD; Amendment 39–16852; AD 2011–23–01]

RIN 2120–AA64

Airworthiness Directives; Thielert Aircraft Engines GmbH (TAE) Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are superseding an existing airworthiness directive (AD) for Thielert Aircraft Engines GmbH (TAE) Models TAE 125–01 and TAE 125–02–99 reciprocating engines. That AD currently requires replacement of certain part numbers (P/Ns) and serial numbers (S/Ns) of clutch assemblies due to clutch failure. The failures identified above could lead to engine in-flight shutdown and loss of control of the airplane. This AD requires the same actions, but applies the corrective action to an additional 244 affected clutch assemblies. This AD was prompted by TAE identifying additional clutch assemblies with nonconforming disc springs. We are issuing this AD to correct the unsafe condition on these products.

DATES: This AD becomes effective November 22, 2011.

The Director of the Federal Register approved the incorporation by reference of Thielert Aircraft Engines GmbH Service Bulletin (SB) No. TM TAE 125–0021, Revision 1, dated August 17, 2011, and SB No. TM TAE 125–1011 P1, Revision 2, dated August 31, 2011, listed in the AD as of November 22, 2011.

We must receive comments on this AD by December 22, 2011.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m.

and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Alan Strom, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *email: alan.strom@faa.gov; phone:* (781) 238–7143; *fax:* (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Discussion

On August 16, 2010, we issued AD 2010–18–02, Amendment 39–16415 (75 FR 52240, August 25, 2010), for certain TAE models TAE 125–01 and TAE 125–02–99 reciprocating engines. That AD resulted from reports of engine in-flight shutdowns. Preliminary investigations by TAE showed that nonconforming disc springs (improper heat treatment) used in a certain production batch of the clutch caused the shutdowns. That AD requires replacement of certain clutch assemblies. We issued that AD to prevent in-flight shutdown leading to loss of control of the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2010–18–02 (75 FR 52240, August 25, 2010), TAE identified an additional 244 affected clutch assemblies with nonconforming disc springs. The European Aviation Safety Agency (EASA) has issued AD 2011–0152–E, dated August 18, 2011, which requires replacement of additional clutch assemblies.

Relevant Service Information

We reviewed TAE SB No. TM TAE 125–0021, Revision 1, dated August 17, 2011, and SB No. TM TAE 125–1011 P1 Revision 2, dated August 31, 2011. The SBs describe procedures for removing the affected clutch assemblies from service, and contain the expanded list of serial numbers of affected clutch assemblies.

FAA's Determination

We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires, for engines with affected clutch assemblies that have accumulated 100 flight hours or more, replacement of affected clutch assemblies before further flight, and for engines with affected clutch assemblies that have accumulated less than 100 flight hours, replacement of affected clutch assemblies before accumulating 100 flight hours.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because of TAE identifying 244 additional clutch assemblies with nonconforming disc springs and the need for operators to comply with some of the AD actions before further flight. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2010–0683; and directorate identifier 2010–NE–25–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Cost of Compliance

We estimate that this AD will affect about 104 engines installed on airplanes of U.S. registry. We also estimate that it will take about 16 work-hours per engine to perform the clutch assembly replacement. The average labor rate is $85 per work-hour. Required parts will cost about $1,796. Based on these figures, we estimate the cost of the AD on U.S. operators to be $328,224.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2010–18–02, Amendment 39–16415 (75 FR 52240, August 25, 2010), and adding the following new AD:

2011–23–01 Thielert Aircraft Engines GmbH: Amendment 39–16852; Docket No. FAA–2010–0683; Directorate Identifier 2010–NE–25–AD.

(a) Effective Date

This AD is effective November 22, 2011.

(b) Affected ADs

This AD supersedes AD 2010–18–02, Amendment 39–16415, (75 FR 52240, August 25, 2010).

(c) Applicability

This AD applies to Thielert Aircraft Engines GmbH (TAE):

(1) TAE 125–01 reciprocating engines (commercial designation Centurion 1.7), all serial numbers (S/Ns), if a clutch assembly part number (P/N) 02–7210–11001R13 is installed, and

(2) TAE 125–02–99 reciprocating engines (commercial designation Centurion 2.0), all S/Ns, if a clutch assembly P/N 05–7211–K006001 or P/N 05–7211–K006002 is installed.

(d) Unsafe Condition

This AD was prompted by TAE identifying additional clutch assemblies that could fail with nonconforming disc springs. These failures could lead to engine in-flight shutdown and loss of control of the airplane. We are issuing this AD to correct the unsafe condition on these products.

(e) Actions and Compliance

Unless already done, do the following actions.

(1) After the effective date of this AD, for clutch assembly P/N 02–7210–11001R13, P/N 05–7211–K006001 and P/N 05–7211–K006002, with an S/N listed in TAE Service Bulletin (SB) No. TM TAE 125–0021, Revision 1, dated August 17, 2011, or SB No. TM TAE 125–1011 P1, Revision 2, dated August 31, 2011, do the following:

(i) For engines with affected clutch assemblies that have accumulated 100 flight hours or more on the effective date of this AD, replace the clutch assembly before further flight.

(ii) For engines with affected clutch assemblies that have accumulated less than 100 flight hours on the effective date of this AD, replace the clutch assembly before accumulating 100 flight hours.

(2) After the effective date of this AD:

(i) Do not install an engine having a clutch assembly that is listed by S/N in TAE SB No. TM TAE 125–0021, Revision 1, dated August 17, 2011, or SB No. TM TAE 125–1011 P1, Revision 2, dated August 31, 2011, and

(ii) Do not install any clutch assembly listed by S/N in TAE SB No. TM TAE 125–0021, Revision 1, dated August 17, 2011, or SB No. TM TAE 125–1011 P1, Revision 2, dated August 31, 2011, into any engine.

(f) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs to this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(g) Related Information

(1) Refer to MCAI EASA AD 2011–0152–E, dated August 18, 2011, for related information.

(2) Contact Alan Strom, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *email: alan.strom@faa.gov; phone:* (781) 238–7143; *fax:* (781) 238–7199, for more information about this AD.

(h) Material Incorporated by Reference

(1) You must use Thielert Aircraft Engines GmbH Service Bulletin No. TM TAE 125–0021, Revision 1, dated August 17, 2011, and Service Bulletin No. TM TAE 125–1011 P1, Revision 2, dated August 31, 2011, to identify the affected clutch assemblies requiring replacement by this AD.

(2) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(3) For service information identified in this AD, contact Thielert Aircraft Engines GmbH, Platanenstrasse 14 D–09350, Lichtenstein, Germany; *phone:* +49–37204–696–0; *fax:* +49–37204–696–55; *email: info@centurion-engines.com.*

(4) You may review copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Burlington, Massachusetts, on October 19, 2011.

Peter A. White,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2011–28672 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0773; FRL–9487–6]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Revision to Nitrogen Oxides Budget Trading Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the Virginia State Implementation Plan (SIP). The revision pertains to regulatory language in its nitrogen oxides (NO_X) Budget Trading Program that inadvertently ended its NO_X budget at the end of the 2008 ozone season. EPA is approving this revision in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on January 6, 2012 without further notice, unless EPA receives adverse written comment by December 7, 2011. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2011–0773 by one of the following methods:

A. *www.regulations.gov*. Follow the on-line instructions for submitting comments.

B. *Email: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2011–0773, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2011–0773. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you

consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814–2308, or by email at *powers.marilyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. On September 27, 2010, the Commonwealth of Virginia Department of Environmental Quality (VADEQ) submitted a formal revision to its State Implementation Plan (SIP).

The SIP revision pertains to the NO_X budget established in Virginia regulation 9VAC5 Chapter 140 Part I (NO_X Budget Trading Program), which was adopted by the Commonwealth and approved into its SIP to meet the requirements of the NO_X SIP Call. Virginia determined that regulatory language inadvertently ended the State budget at the end of the 2008 ozone season. Because the NO_X SIP Call requirements continue to apply to the affected states, revision of the applicable end date in regulation 9VAC5 Chapter 140, Part I is required in order for the budget to apply to ozone season 2009 and beyond. It should be noted that Virginia has continued to comply with the requirements of the NO_X SIP Call through its approved Clean Air Interstate Rule (CAIR) NO_X Ozone Season Trading Program at 9VAC5 Chapter 140, Part III. As explained in the preamble for CAIR (70 FR 25162, May 12, 2005), states could meet the requirements of the NO_X SIP Call by achieving all of the emissions reductions required under CAIR from electric generating units (EGUs) by participating in the CAIR Ozone Season NO_X Trading Program, and by bringing its non-EGUs that were participating in the NO_X SIP Call Budget Trading Program into the CAIR Ozone Season NO_X Trading Program using the same non-EGU budget and applicability requirements that were in their NO_X SIP Call Budget Trading Program. Virginia chose to implement its CAIR ozone season NO_X obligations by participating in the CAIR Ozone Season NO_X Trading Program and brought their non-EGUs into this program, which was approved into the Virginia SIP on December 28, 2007 (72 FR 73602).

II. Summary of SIP Revision

On September 27, 2010, VADEQ submitted a SIP revision that extends the NO_X SIP Call budget beyond the 2008 ozone season. The SIP revision consists of amendments to sections 5–140–900, 5–140–920, and 5–140–930 that extend the EGU NO_X budget of 17,091 tons and the non-EGU budget of 4,104 tons to the 2009 ozone season and each ozone season thereafter.

III. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. * * *'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.'' Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with

Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

IV. Final Action

EPA is approving the SIP revision submitted by VADEQ on September 27, 2009 that extends the NO_X SIP Call budget beyond the 2008 ozone season. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on January 6, 2012 without further notice unless EPA receives adverse comment by December 7, 2011. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 6, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action to extend Virginia's budget under the NO_X SIP Call may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Sulfur oxides.

Dated: October 25, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

40 CFR Part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for 40 CFR part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart VV—Virginia

■ 2. In § 52.2420, the table in paragraph (c) is amended by revising the entries for Sections 5–140–900, 5–140–920, and 5–140–930 to read as follows:

§ 52.2420 Identification of plan.

(c) * * *

* * * * *

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
*	*	*	*	*
9 VAC 5, Chapter 140	**State trading program budget**			
Part I	**NO_X Budget Trading Program**			
*	*	*	*	*
Article 10	**State Trading Program Budget and Compliance Supplement Pool**			
5–140–900	State trading program budget	12/31/08	11/7/11 [Insert page number where the document begins].	Revise applicable year to 2004 and each year thereafter.
*	*	*	*	*
5–140–920	Total electric generating unit allocations.	12/31/08	11/7/11 [Insert page number where the document begins].	Add subsection B, which extends the NO_X budget beyond 2008.
5–140–930	Total non-electric generating unit allocations.	12/31/08	11/7/11 [Insert page number where the document begins].	Add subsection B, which extends the NO_X budget beyond 2008.
*	*	*	*	*

* * * * *

[FR Doc. 2011–28640 Filed 11–4–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 43

[WC Docket No. 07–38; FCC 08–89, 08–148]

Development of Nationwide Broadband Data To Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: The Federal Communications Commission published a document in the **Federal Register** that contained new information collection requirements. This document announces that, on January 30, 2009, the Office of Management and Budget (OMB) gave approval for these information requirements contained in the Commission's Report and Order and Further Notice of Proposed Rulemaking, as well as the Order on Reconsideration, Development of Nationwide Broadband Data To Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership.

DATES: The amendments to 47 CFR 1.7001 and 47 CFR 43.11 in the final rule published July 2, 2008, at 73 FR 37869 are effective November 7, 2011.

FOR FURTHER INFORMATION CONTACT: Jeremy Miller, Industry Analysis and Technology Division, Wireline Competition Bureau, at (202) 418–1507, or via the Internet at *jeremy.miller@fcc.gov*.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission has received OMB approval for the rules contained in information collection OMB Control No. 3060–0816, Local Telephone Competition and Broadband Reporting. The information collection was adopted in two orders: (1) The Report and Order and Notice of Proposed Rulemaking, Development of Nationwide Broadband Data To Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership in WC Docket No. 07–38, which appears at 73 FR 37869, July 2, 2008, and (2) the Order on Reconsideration, Development of Nationwide Broadband Data To Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership in WC Docket No. 07–38, which appears at 73 FR 37861, July 2, 2008. These information requests required OMB approval to be effective. Through this document, the Commission announces that it has received this approval (OMB Control No. 3060–0816, Expiration Date: April 30, 2013), and that the adopted rules are in effect. Pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, an agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Notwithstanding any other provisions of law, no person shall be subject to any penalty for failing to comply with a collection of information subject to the

Paperwork Reduction Act (PRA) that does not display a valid control number. Questions concerning the OMB control numbers and expiration dates should be directed to Judith Boley-Herman, Federal Communications Commission, (202) 418–0214, or via the Internet at *Judith-B.Herman@fcc.gov.*

Accordingly, the amendments to 47 CFR 1.7001 and 47 CFR 43.11 in the final rule published July 2, 2008, at 73 FR 37869 are effective November 7, 2011.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2011–26947 Filed 11–4–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 10–51; FCC 11–155]

Structure and Practices of the Video Relay Service Program

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection associated with the Commission's Structure and Practices of the Video Relay Service Program, Memorandum Opinion and Order. The information collection requirements were approved on October 20, 2011 by OMB.

DATES: 47 CFR 64.606 (a)(2)(ii)(A)(*4*) through (*8*), and (a)(2)(ii)(E), published at 76 FR 67070, October 31, 2011 is effective November 7, 2011.

FOR FURTHER INFORMATION CONTACT: Gregory Hlibok, Disability Rights Office, Consumer and Governmental Affairs Bureau, at (202) 559–5158 (voice and videophone), or email: *Gregory.Hlibok@fcc.gov.*

SUPPLEMENTARY INFORMATION: This document announces that, on October 20, 2011, OMB approved, for a period of three years, the information collection requirements contained 47 CFR 64.606 (a)(2)(ii)(A)(*4*) through (*8*), and (a)(2)(ii)(E). The Commission publishes this document to announce the effective date of these rule sections. See, In the Matter of Structure and Practices of the Video Relay Service Program; Sprint Nextel Corporation Expedited Petition for Clarification; Sorenson Communications, Inc. Petition for Reconsideration of Two Aspects of the Certification Order; AT&T Services, Inc. Petition for Reconsideration of AT&T, CG Docket No. 10–51; FCC 11–155, published at 76 FR 67070, October 31, 2011. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street SW., Washington, DC 20554. Please include the OMB Control Number, 3060–1150, in your correspondence. The Commission will also accept your comments via the Internet if you send them to *PRA@fcc.gov.*

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received OMB approval on October 20, 2011, for the information collection requirements contained in the Commission's rules at 47 CFR 64.606 (a)(2)(ii)(A)(*4*) through (*8*) and (a)(2)(ii)(E).

Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060–1150.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

Federal Communications Commission.

Bulah P. Wheeler,

Deputy Manager, Office of the Secretary, Office of Managing Director.

[FR Doc. 2011–28682 Filed 11–4–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 0808041037–1649–02]

RIN 0648–AX05

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Amendment 11

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS is implementing approved measures in Amendment 11 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan, developed by the Mid-Atlantic Fishery Management Council. The approved measures include: A tiered limited access program for the Atlantic mackerel fishery; an open access incidental catch permit for mackerel; an update to essential fish habitat designations for all life stages of mackerel, longfin squid, *Illex* squid, and butterfish; and the establishment of a recreational allocation for mackerel.

DATES: Effective December 7, 2011, except for the amendment to § 648.4, which is effective March 1, 2012.

ADDRESSES: Copies of supporting documents used by the Mid-Atlantic Fishery Management Council (Council), including the Final Environmental Impact Statement (FEIS) and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), are available from: Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 N. State Street, Dover, DE 19901. The FEIS/RIR/IRFA is accessible via the Internet at *http://www.nero.noaa.gov.* NMFS prepared a Final Regulatory Flexibility Analysis (FRFA), which is contained in the Classification section of the preamble of this final rule. Copies of the FRFA, Record of Decision (ROD), and the Small Entity Compliance Guide are available from the Regional Administrator, Northeast Regional Office, NMFS, 55 Great Republic Drive, Gloucester, MA 01930, and are also available via the internet at *http://www.nero.noaa.gov.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule may be submitted to NMFS, Northeast Regional Office and by email to

OIRA_Submission@omb.eop.gov, or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Aja Szumylo, Fishery Policy Analyst, (978) 281–9195, *fax* (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

This final rule implements the measures in Amendment 11, which was approved on behalf of the Secretary of Commerce (Secretary) on September 30, 2011. A proposed rule was published in the **Federal Register** on August 1, 2011 (76 FR 45742), with comments accepted through September 15, 2011. The details of the development of Amendment 11 were contained in the preamble of the proposed rule and are not repeated here.

Approved Measures

Changes in the descriptions of the management measures from the proposed rule's descriptions are noted below. Changes in the regulatory text from the proposed rule are noted under ''Changes from Proposed Rule to Final Rule'' in the preamble of this final rule.

As noted in the proposed rule, some of the regulations implemented through Amendment 11 are associated with the Council's Omnibus Annual Catch Limit and Accountability Measures (Omnibus) Amendment, which was approved by the Secretary on August 12, 2011, and published as a final rule on September 29, 2011 (76 FR 60606). Several sections of regulatory text are affected by both actions. Since the Omnibus Amendment and its regulatory text are now finalized, the regulatory text presented in this final rule references the updated regulations. Therefore, it differs slightly in structure, but not content, from the regulations presented in the proposed rule.

1. Limited Access Mackerel Permits and Trip Limits

Amendment 11 implements a three-tiered limited access permit system for the mackerel fishery. Vessels that do not qualify for a limited access mackerel permit are eligible to receive the open access mackerel permit described below. Initial trip limits established for each permit category can be adjusted through the specifications process.

In order to be eligible for a limited access mackerel permit, applicants must meet both a permit history requirement and a landings requirement. The preamble of the proposed rule noted that the permit history requirement and landings requirement must be derived from the same vessel (*i.e.,* it is not possible to combine the permit criteria from Vessel A with the landings criteria from Vessel B to create a mackerel eligibility). This statement is inconsistent with the regulatory text in the proposed rule. NMFS clarifies that permit and landings requirement must be derived from the same vessel unless they are combined through vessel replacement prior to March 21, 2007.

Permit Requirement

To meet the permit requirement, a vessel must have been issued a Federal mackerel permit that was valid on March 21, 2007, or must be replacing a vessel that was issued a Federal mackerel permit that was valid on March 21, 2007. If the vessel sunk, was destroyed, or transferred prior to March 21, 2007, and a mackerel permit was not issued to a replacement vessel as of March 21, 2007, the permit issuance criteria may be satisfied if the vessel was issued a valid Federal mackerel permit at any time between March 21, 2006, and March 21, 2007.

Landings Requirement

NMFS will use dealer data in its database to determine eligibility. If NMFS' data do not demonstrate that a vessel made landings of mackerel that satisfy the eligibility criteria for a limited access permit, applicants must submit dealer receipts that verify landings, or use other sources of information (*e.g.,* joint venture receipts) to demonstrate that there is incorrect or missing information in the Federal dealer records via the appeals process described below.

Vessels that fished cooperatively for mackerel in pair trawl operations may divide the catch history between the two vessels in the pair through third-party verification and supplemental information, such as previously submitted vessel trip reports (VTRs), or dealer reporting. The two owners must apply for a limited access mackerel permit jointly and must submit proof that they have agreed to the division of landings. This approach was used to qualify pair trawl vessels in Amendment 1 to the Atlantic Herring Fishery Management Plan (FMP).

To qualify for a Tier 1 Limited Access Mackerel permit, a vessel must have been issued a Federal mackerel permit that was valid on March 21, 2007, and must have landed at least 400,000 lb (181.44 mt) of mackerel in any one year between January 1, 1997, and December 31, 2005, as verified by NMFS records or documented through dealer receipts submitted by the applicant. The Tier 1 Limited Access Mackerel permit allows vessels to possess and land unlimited amounts of mackerel while the mackerel fishery is open to directed fishing.

To qualify for a Tier 2 Limited Access Mackerel permit, a vessel must have been issued a Federal mackerel permit that was valid on March 21, 2007, and must have landed at least 100,000 lb (45.36 mt) of mackerel in any one year between March 1, 1994, and December 31, 2005, as verified by NMFS records or documented through dealer receipts submitted by the applicant. The Tier 2 Limited Access Mackerel permit allows vessels to possess and land 135,000 lb (61.23 mt) of mackerel per trip while the mackerel fishery is open to directed fishing.

To qualify for a Tier 3 Limited Access Mackerel permit, a vessel must have been issued a Federal mackerel permit that was valid on March 21, 2007, and must have landed at least 1,000 lb (0.45 mt) of mackerel in any one year between March 1, 1994, and December 31, 2005, as verified by NMFS records or documented through dealer receipts submitted by the applicant. The Tier 3 Limited Access Mackerel permit allows vessels to possess and land 100,000 lb (45.36 mt) of mackerel per trip while the mackerel fishery is open for directed fishing, or while the Tier 3 allocation is still available.

The current regulations state that, during a closure of the directed mackerel fishery that occurs prior to June 1, vessels issued a mackerel permit may not fish for, possess, or land more than 20,000 lb (9.08 mt) of mackerel per trip, and that, during any closure that occurs after June 1, vessels may not fish for, possess, or land more than 50,000 lb (22.7 mt) of mackerel per trip. While the preamble to the proposed rule stated that this provision would be maintained as is, the regulatory text stated that the closure possession limit would be 20,000 lb (9.08 mt), regardless of when a closure occurs during the fishing year. NMFS clarifies in this final rule that the closure possession limit presented in the regulatory text is consistent with the intent of Amendment 11; thus, the closure possession limit for mackerel will be 20,000 lb (9.08 mt).

2. Limited Access Vessel Permit Provisions

Amendment 11 establishes measures to govern future transactions related to limited access vessels, such as purchases, sales, or reconstruction. These measures apply to all limited access mackerel vessels. Except as noted, the provisions in this amendment are consistent with those that govern most of the other Northeast region limited access fisheries; there are some differences in the limited access program for American lobster.

Initial Eligibility and Application

Initial eligibility for a mackerel limited access permit must be established during the first year after the implementation of Amendment 11. A vessel owner is required to submit an application for a mackerel limited access permit within 12 months of the effective date of the final regulations. In order to expedite the transition to the limited access mackerel program, applicants wishing to fish for mackerel with a limited access permit after March 1, 2012, must submit an application by January 31, 2012. After March 1, 2012, current mackerel permit holders who have not yet submitted an application for a limited access mackerel permit, and individuals who have submitted incomplete or unsuccessful applications for a limited access mackerel permit, will automatically be re-designated as open access permit holders under the new mackerel permit system, and will be subject to the open access possession limit described in this final rule. These applicants will receive a letter explaining the reason for the permit's return. All applicants have until February 28, 2013, to submit an initial application.

Initial Confirmation of Permit History (CPH) Application

A person who does not currently own a fishing vessel, but who has owned a qualifying vessel that has sunk, been destroyed, or transferred to another person, and the applicant has lawfully retained the valid mackerel permit and fishing history, may apply for and receive a CPH. The CPH provides a benefit to a vessel owner by securing limited access eligibility through a registration system when an individual does not currently own a vessel; the individual can later transfer the permit onto a replacement vessel. To be eligible to obtain a CPH, the applicant must show that the qualifying vessel meets the eligibility requirements for the limited access mackerel permit in question. If the vessel sank, was destroyed, or was transferred before March 21, 2007, the permit issuance criteria may be satisfied if the vessel was issued a valid Federal mackerel permit at any time between March 21, 2006, and March 21, 2007. Vessel owners who are issued a CPH can obtain a vessel permit for a replacement vessel in the future, consistent with the vessel size upgrade restrictions, based upon the vessel length, tonnage, and horsepower of the vessel on which the CPH issuance is based. Applicants wishing to place their limited access mackerel permit directly into CPH will be given the same initial application deadline as applicants applying for an active limited access mackerel permit, namely from March 1, 2012, to February 28, 2013.

Permit Transfers

A mackerel limited access permit and fishing history is presumed to transfer with a vessel at the time it is bought, sold, or otherwise transferred from one owner to another, unless it is retained through a written agreement signed by both parties in the vessel sale or transfer.

Multiple Vessels With One Owner

The Council proposed a provision specific to multiple vessel ownership, qualification, and replacement. The provision states that, if an individual owns more than one vessel, but only one of those vessels has the permit and landings history required to be eligible for a limited access mackerel permit, the individual can replace the vessel that it determined to be eligible with one of his/her other vessels, provided that the replacement vessel complies with the upgrade restrictions detailed below. The final rule does not contain a single regulation specific to the Council's proposed measure. Rather, the individual regulations pertaining to qualification, baselines, upgrades, and vessel replacements separately address the Council's proposed measure.

This provision does not exempt owners of multiple vessels from the permit-splitting provision, described below. For example, if a vessel owner has a limited access multispecies permit on the same vessel that created the mackerel eligibility, the entire suite of permits must be replaced onto the owner's other vessel in order to move the mackerel eligibility. In addition, if an individual owns two vessels, a 50-ft (15.2-m) vessel with a mackerel eligibility, and a 65-ft (19.8-m) vessel, the mackerel eligibility cannot be moved onto the larger vessel, because it is outside of the vessel upgrade restrictions.

Permit Splitting

Amendment 11 adopts the permit-splitting provision currently in effect for other limited access fisheries in the region. Therefore, a limited access mackerel permit may not be issued to a vessel if the vessel's permit history was used to qualify another vessel for any other limited access permit. This means all limited access permits, including limited access mackerel permits, must be transferred as a package when a vessel is replaced or sold.

However, Amendment 11 explicitly states that the permit-splitting provision does not apply to the retention of an open access mackerel permit and fishing history that occurred prior to April 3, 2009, if any limited access permits were issued to the subject vessel. Thus, vessel owners who sold a vessel with limited access permits and retained the open access mackerel permit and landings history prior to April 3, 2009, with the intention of qualifying a different vessel for a limited access mackerel permit, are allowed to do so under Amendment 11.

Qualification Restriction

Consistent with previous limited access programs, no more than one vessel can qualify, at any one time, for a limited access permit or CPH based on that or another vessel's fishing and permit history, unless more than one owner has independently established fishing and permit history on the vessel during the qualification period and has either retained the fishing and permit history, as specified above, or owns the vessel at the time of initial application under Amendment 11. If more than one vessel owner claims eligibility for a limited access permit or CPH, based on a vessel's single fishing and permit history, the NMFS Regional Administrator will determine who is entitled to qualify for the permit or CPH based on information submitted and in compliance with the applicable permit provisions.

Appeal of Permit Denial

Amendment 11 specifies an appeals process for applicants who have been denied a limited access Atlantic mackerel permit. Applicants have two opportunities to appeal the denial of a limited access mackerel permit. The review of initial application denial appeals will be conducted under the authority of the Regional Administrator at NMFS's Northeast Regional Office. The review of second denial appeals will be conducted by a hearing officer appointed by the Regional Administrator, or through a National Appeals program, which is under development by NMFS and may be utilized for mackerel appeals.

An appeal of the denial of an initial permit application (first level of appeal) must be made in writing to the NMFS Northeast Regional Administrator. Under this amendment, appeals must be based on the grounds that the information used by the Regional Administrator in denying the permit was incorrect. Amendment 11 requires appeals to be submitted to the Regional Administrator, postmarked no later than 30 days after the denial of an initial

limited access mackerel permit application. The appeal must be in writing, must state the specific grounds for the appeal, the limited access mackerel permit category for which the applicant believes he should qualify, and information to support the appeal. The appeal shall set forth the basis for the applicant's belief that the Regional Administrator's decision was made in error. The appeal will not be reviewed without submission of information in support of the appeal. The Regional Administrator will appoint a designee to make the initial decision on the appeal.

Should the appeal be denied, the applicant is allowed to request a review of the Regional Administrator's appeal decision (second level of appeal). Such a request must be in writing postmarked no later than 30 days after the appeal decision, must state the specific grounds for the appeal, and must include information to support the appeal. A hearing will not be conducted without submission of information in support of the appeal. If the request for review of the appeal decision is not made within 30 days, the appeal decision is the final administrative action of the Department of Commerce. If the National Appeals process is not fully established at the time of the party's appeal, the Regional Administrator will appoint a hearing officer. The hearing officer will make findings and a recommendation to the Regional Administrator, which are advisory only. The Regional Administrator's decision is the final administrative action of the Department of Commerce.

The owner of a vessel denied a limited access mackerel permit can fish for mackerel while the decision on appeal is pending, provided that the denial has been appealed, an appeal decision has not been made by the Regional Administrator, and the vessel has on board a letter from the Regional Administrator authorizing the vessel to fish under the limited access category for which the applicant has submitted the appeal. The Regional Administrator will issue such a letter for the pendency of any appeal. If the appeal is ultimately denied under NMFS' administrative review, the Regional Administrator will send a notice of final denial to the vessel owner, and the authorizing letter becomes invalid 5 days after the receipt of the notice of denial.

Establishing Vessel Baselines

A vessel's baseline refers to those specifications (length overall, gross registered tonnage (GRT), net tonnage (NT), and horsepower (HP)) from which any future vessel size change is measured. The vessel baseline specifications for vessels issued a limited access mackerel permit will be the specifications of the vessel that was initially issued the limited access permit as of the date that the vessel qualifies for such a permit. If a vessel owner is initially issued a CPH instead of a mackerel permit, the attributes of the vessel that is the basis of the CPH will establish the size baseline against which future vessel limitations would be evaluated. If the vessel that established the CPH is less than 20 ft (6.09 m) in length overall, then the baseline specifications associated with other limited access permits in the CPH suite will be used to establish the mackerel baseline specifications. If the vessel that established the CPH is less than 20 ft (6.09 m) in length overall, the limited access mackerel eligibility was established on another vessel, and there are no other limited access permits in the CPH suite, then the applicant must submit valid documentation of the baseline specifications of the vessel that established the eligibility. If a vessel owner applying for a CPH has a contract to purchase a vessel to replace the vessel for which CPH was issued prior to the submission of the mackerel limited access permit application (for the CPH), then the vessel under contract to be purchased will form the baseline specifications for that vessel, provided an initial application for the contract vessel to replace the vessel for which the CPH was issued is received by December 31, 2012 (1 full year after the end of the initial application period).

Vessel Upgrades

A vessel may be upgraded in size, whether through retrofitting or replacement, and be eligible to retain or renew a limited access permit, only if the upgrade complies with the limitations in Amendment 11. The vessel's HP can be increased only once, whether through refitting or vessel replacement. Such an increase cannot exceed 20 percent of the vessel's baseline specifications. The vessel's length, GRT, and NT can increase only once, whether through refitting or vessel replacement. Any increase in any of these three specifications of vessel size cannot exceed 10 percent of the vessel's baseline specifications. If any of these three specifications is increased, any increase in the other two must be performed at the same time. This type of upgrade can be done separately from an engine HP upgrade. Amendment 11 maintains the existing specification of maximum length, size and HP for vessels engaged in the Atlantic mackerel fishery (165 ft (50.02 m), 75 GRT (680.3 mt), and 3,000 HP). Tier 1 and Tier 2 vessels must also comply with the upgrade restrictions relevant to the vessel hold volume certification described below.

Vessel Hold Capacity Certification

In addition to the standard baseline specifications, Tier 1 and Tier 2 vessel owners are required to obtain a fish hold capacity measurement from a certified marine surveyor. The hold capacity measurement submitted at the time of application for a Tier 1 or Tier 2 limited access mackerel permit will serve as an additional permit baseline for these permit categories. The hold volume for a Tier 1 or Tier 2 permit can only be increased once, whether through refitting or vessel replacement. Any increase cannot exceed 10 percent of the vessel's baseline hold measurement. This type of upgrade can be done separately from the size and HP upgrades. In cases where the qualifying vessel has sunk or been destroyed and the mackerel permit is issued directly into CPH, the hold capacity baseline will be the hold capacity of the first replacement vessel after the permits are removed from CPH. Applicants that qualify for a Tier 1 or 2 mackerel permit would be required to submit fish hold volume measurement by December 31, 2012, or at the first vessel replacement, whichever is sooner. This requirement was not noted in the preamble, but was included in the regulatory text in the proposed rule.

Vessel Replacements

The term ''vessel replacement,'' in general, refers to replacing an existing limited access vessel with another vessel. In addition to addressing increases in vessel size, hold capacity, and HP, Amendment 11 establishes a restriction requiring the same entity to own both the vessel (along with the limited access permit and fishing history) that is being replaced, and the replacement vessel.

Voluntary Relinquishment of Eligibility

Amendment 11 includes a provision to allow a vessel owner to voluntarily exit a limited access fishery. Such relinquishment is permanent. If a vessel's limited access permit history for the mackerel fishery is voluntarily relinquished to the Regional Administrator, no limited access permit for that fishery may be reissued or renewed based on that vessel's history.

Permit Renewals and CPH Issuance

Amendment 11 specifies that a vessel owner must maintain the limited access permit status for an eligible vessel by renewing the permits on an annual basis

or applying for the issuance of a CPH. A vessel's limited access permit history will be cancelled due to the failure to renew each year, in which case, no limited access permit can ever be reissued or renewed based on the vessel's history or to any other vessel relying on that vessel's history. All limited access permits must be issued on an annual basis by the last day of the fishing year for which the permit is required, unless a CPH has been issued. A CPH remains valid without annual renewal until the CPH is replaced by an active vessel. A complete application for such permits must be received no later than 30 days before the last day of the permit year.

3. Tier 3 Allocation and Additional Reporting Requirements

Amendment 11 establishes an allocation for participants in the limited access mackerel fishery that hold a Tier 3 permit. Tier 3 vessels will be allocated a maximum catch of up to 7 percent of the commercial mackerel quota (the remainder of the commercial mackerel quota will be available to Tier 1 or Tier 2 vessels). The 7 percent allocation will be put into effect with the 2012 specifications for the Atlantic Mackerel, Squid, and Butterfish (MSB) fisheries, prior to the effective date of the Tier 3 limited access permit. This will allow for monitoring of the cap as Tier 3 permits are issued to successful applicants. The Tier 3 allocation will be set annually during the specifications process. During a closure of the Tier 3 mackerel fishery, vessels issued a mackerel permit may not fish for, possess, or land more than 20,000 lb (9.08 mt) of mackerel per trip. In order to monitor Tier 3 landings, Amendment 11 requires owners of vessels that hold a Tier 3 limited access mackerel permit to submit VTRs on a weekly basis.

4. Open Access Permit and Possession Limit

Any vessel, even vessels that have not been issued a mackerel permit before, can be issued an open access mackerel permit that authorizes the possession and landing of up to 20,000 lb (9.07 mt) of mackerel per trip. The open access possession limit stays the same during a closure of the directed mackerel fishery.

5. Updates to EFH Definitions

Amendment 11 revises the EFH text descriptions for all MSB species based on updated data from the Northeast Fisheries Science Center (NEFSC) trawl survey, the Marine Resources Monitoring Assessment and Prediction Program (MARMAP), state bottom trawl surveys, NOAA's Estuarine Living Marine Resources (ELMR) program, and scientific literature on habitat requirements. The amendment designates as EFH the area associated with 95 percent of the cumulative geometric mean catches for all MSB species. There are no regulatory provisions associated with these designations. Text descriptions and maps for the new EFH designation can be found in the FEIS.

6. Recreational Mackerel Allocation

Amendment 11 establishes an allocation to the recreational fishery in order to incorporate recreational mackerel annual catch limits and accountability measures into the framework for the Council's Omnibus Amendment. The recreational allocation is set equal to 6.2 percent of the domestic mackerel allowable biological catch. This allocation corresponds to the proportion of total U.S. mackerel landings that was accounted for by the recreational fishery from 1997–2007 times 1.5. The Council can take action via specifications, a framework adjustment, or amendment to adjust any disconnect between the recreational allocation and future recreational harvests.

Comments and Responses

Six comments were submitted on Amendment 11: One on behalf of O'Hara Corporation and Starlight Inc; two identical comments by the Garden State Seafood Association (GSSA) and Lund's Fisheries Incorporated; one from the National Coalition for Marine Conservation (NCMC), a non-governmental organization devoted primarily to the conservation of highly migratory species and pelagic species such as menhaden, herring and mackerel; and two from individuals. Several issues not relevant to Amendment 11 were raised by various commenters; only the comments relevant to Amendment 11 are addressed below.

General Comments

Comment 1: NCMC urged NMFS to disapprove the limited access program alternatives in Amendment 11 because, in its view, the program institutionalizes a fleet structure and capacity levels that are not compatible with sustainable management of the mackerel stock, especially given uncertainty in the most recent mackerel assessment (Transboundary Resources Assessment Committee Status Report; March 2010). They commented that the estimated fleet harvest capacity for the preferred alternative is an order of magnitude higher than the long-term projected quotas available to U.S. fishermen. They noted that this excess capacity could still lead to a ''race to fish,'' particularly because of the large number of vessels anticipated to qualify for Tier 3, and the limited quota for this tier.

Response: NMFS acknowledges that the mackerel stock status is uncertain, but does not find this to be a reason to delay development and implementation of a limited access mackerel program. Rather than drastically reducing fleet capacity, the Council sought to stratify vessels into tiers based on historic performance in order to allow them to fish for mackerel as they had in the past. This would prevent the fleet from substantially expanding effort. The program is expected to reduce the number of vessels that will be able to land more than 20,000 lb (9.08 mt) of mackerel per trip. In 2010, there were 2,331 mackerel permit holders. Only 403 of these permit holders are expected to qualify for a limited access mackerel permit. Because an unconstrained, overcapitalized mackerel fleet is more likely to exceed fishing mortality targets, NMFS determined that the Council's measures to proactively reduce the current capacity and prevent future increases in capacity are warranted, regardless of the status of the mackerel resource. NMFS found the limited access program measures consistent with all National Standards.

NMFS agrees that the fleet resulting from the proposed limited access program is estimated in Amendment 11 to have the capacity of catching more than expected quotas for upcoming years. However, given the short mackerel fishing season, the great variability in mackerel availability, and the inability of the fleet to harvest allowable quotas, harvest capacity appears to be less of a factor in the success of the fleet. Furthermore, hard quotas have always been used as a mechanism to control mackerel harvests, and will continue to be used following implementation of the limited access program. The institution of a limited access program serves as a constraint on the number of mackerel fishery participants, and provides an indirect control on mackerel catch.

The Council designed Tier 3 to provide access to mackerel, should localized abundance occur where mackerel is not frequently targeted. NMFS determined that, because the vessels expected to qualify for Tier 3 have historically had per-trip mackerel landings well below the initial 100,000-lb (45.36-mt) trip limit (average 637 lb (0.24 mt) per trip from 1997–2007), and have typically derived a low percentage

of their revenue from mackerel, it is unlikely that a race to fish will develop as a result of this tier. The trip limits for all of the Tiers can be adjusted in the future via specifications to best meet the objectives of the FMP.

Comment 2: NCMC commented that the sustainable long-term yield values for the mackerel fishery, if used as the basis for the mackerel program, must be derived from an assessment that explicitly considers the role of mackerel as forage in the ecosystem.

Response: The Council did not use sustainable long-term yield values as a basis for the limited access mackerel program. Rather, potential reductions in future harvest levels were presented as one of the justifications for reducing capacity in the fishery. Though the results of the recent mackerel assessment were inconclusive, information on the sources of natural mackerel mortality, including predation on mackerel, was considered in the assessment process. Assessment scientists are working to better incorporate ecosystem considerations, specifically the role of mackerel and other pelagic fish species as forage, in future assessments. This will also be considered by the Council's Scientific and Statistical Committee when it recommends acceptable biological catch (ABC) to the Council each year.

Comment 3: NCMC commented that the impacts of the limited access program on important forage species, such as Atlantic herring, alewife, blueback herring, and American shad, is not adequately analyzed in the FEIS.

Response: NMFS disagrees. Amendment 11 presents NMFS observer information on all species caught and discarded on observer trips and considers the effects of this action on non-mackerel species. Updates to these figures are also presented in the environmental assessments for annual MSB specifications. Mackerel and Atlantic herring are often targeted on the same trip, and landings of both species count against the ACLs established through each FMP. The Council is currently considering measures to address interactions between the mackerel fishery, river herring, and shads in MSB Amendment 14.

Comment 4: NCMC commented that new scientific information regarding spatial and interannual variability in mackerel distribution driven by changes in temperature were not taken into account in the design of the limited access program. NMFC asserts that the mackerel limited access program fails to incorporate the flexibility to address variation and contingencies in the mackerel stock, such as spatial shifts due to temperature and changes to more efficient gear that increase bycatch and reduces forage. They assert that this deficiency is inconsistent with National Standard 6.

Response: This comment fails to recognize that the limited access program is but a part of an overall management program. Variations and contingencies in the stock can be addressed through the annual specification setting process, which incorporates the latest available scientific information on the stock, including its distribution. This process also allows for the consideration and implementation of gear restrictions should they become necessary to achieve a conservation and management objective.

Comments on the Limited Access Permit Provisions

Comment 5: GSSA, Lund's, O'Hara Corporation and Starlight Inc., were generally supportive of the limited access permit provisions, with the exception of the comments below. In particular, they thought the permit qualification alternatives effectively considered both historic and current fishery participants.

Response: NMFS concurs.

Comment 6: GSSA and Lund's were disappointed that alternatives to grant Tier 3 permits to limited access Atlantic herring vessels that would not otherwise qualify for limited access mackerel permits were not adopted by the Council. However, they believe that the proposed 20,000-lb (9.07-mt) trip limit for open access mackerel permits addresses the issue in an alternative way. They requested that the Council be authorized to adjust trip limits as part of the annual specifications process if it is determined that the proposed open access trip limit is not sufficient to avoid regulatory discards of mackerel in the herring fishery.

Response: NMFS agreed with the Council's determination that the open access trip limit was sufficient to prevent regulatory discards. The proposed rule included provisions to allow the Council to adjust trip limits for all mackerel permits in the annual specifications, and NMFS is implementing that provision through this final rule.

Comment 7: GSSA and Lund's expressed concerns that delays in the publication and implementation of a final rule may prevent the implementation of the limited access program on January 1, 2012.

Response: Recognizing that the implementation timelime put forward in the proposed rule may not allow for sufficient time for vessel owners to submit applications, and for NFMS to review and issue applications, the timeline has revised so that the switch to the new permit system will occur on March 1, 2012. NMFS will begin soliciting applications as soon as this final rule publishes. Vessels that wish to fish with a limited access permit on March 1, 2012, must submit an application by January 31, 2012. As explained in the preamble, vessels that miss this date, or that apply and do not qualify for a permit, will be issued an open access permit on March 1, 2012. Vessels will ultimately have until February 28, 2013 to submit an application for a limited access mackerel permit.

Comment 8: GSSA and Lund's support the fish hold capacity measurement requirement for Tier 1 and 2 vessels. However, they expressed concerned about the feasibility of vessel owners submitting this measurement at the time of application.

Response: NMFS clarifies that the fish hold capacity measurement is not required at the time of application. Qualifiers for Tier 1 or Tier 2 permits will be required to submit the fish hold capacity measurement by December 31, 2012, or at the time of the first vessel replacement after the issuance of a Tier 1 or Tier 2 mackerel permit, whichever is sooner. This should allow sufficient time for qualifiers to gather the required documentation.

Comment 9: O'Hara Corporation and Starlight Inc., support the fish hold capacity measurement requirement. However, they disagree with the proposal to allow the hold capacity baseline for vessels that qualify into CPH to be that of the first replacement vessel. They believe that this provision creates a loophole that will allow some permit holders to circumvent the intent of capping capacity in the fishery. They feel that the proposal to establish the fish hold capacity baseline at the time a vessel becomes active in the fishery would allow unlimited increases in vessel hold size prior to bringing that vessel forward for baseline establishment, and well after all other vessels will be limited by their current hold size. They recommend that NMFS disapprove or delay the measures related to upgrade restrictions on vessel hold size, including those recommended for CPH.

Response: NMFS disagrees that this measure should be disapproved. The proposed regulations for vessels that qualify directly into CPH state that the vessel that provides the CPH eligibility establishes the size baseline against

which future vessel size limitations are evaluated. Upgrade restrictions on the other baseline measurements of the vessel that created the CPH, in particular GRT and NT, restrict the size of future replacement vessels. This, in turn, will limit any significant expansions in the fish hold capacity.

Recreational Mackerel Allocation

Comment 10: GSSA and Lund's opposed the decision to set the recreational allocation at 1.5 times the recreational fishery landings from 1997–2007. They believe that there has not been sufficient justification for providing the recreational sector with an allocation that exceeds actual landings in that sector.

Response: The Council selected a recreational allocation higher than actual recreational landings in order to buffer for uncertainty in recreational estimates. Past estimates have not included January or February activity, and recreational mackerel estimates are typically more uncertain than those for other species (*e.g.,* summer flounder or bluefish). This final rule includes provisions for the Council to adjust any disconnect between the recreational allocation and actual recreational harvests via the annual specifications or a framework adjustment.

At-Sea Processing

Comment 11: GSSA and Lund's are disappointed that alternatives to cap at-sea processing were not adopted. They expressed concern that offshore processing could disrupt the supply of mackerel to shoreside processors, which could have negative economic impacts on established fishing communities. They requested that the agency clarify that limits on offshore processing can be established by the Council through the specifications process. Such a provision would have to be established in an amendment to the MSB FMP.

Response: The Council did not recommend establishing a cap on at-sea processing for mackerel because economic allocation appeared to be the sole supporting rationale, which is inconsistent with National Standard 5 of the Magnuson-Stevens Act. NMFS agrees with the Council's determination. Further, NMFS can only approve or disapprove the Council's recommended measures in an amendment, and cannot put forward provisions that would allow the Council to establish a cap on at-sea processing through specifications in the future.

Changes From Proposed Rule to Final Rule

The final rule adjusts the timing of the implementation of the new limited access permit system (from January 1, 2012, to March 1, 2012). The final date to submit an initial application for the limited access program is changed to February 28, 2013. This rulemaking also clarifies that the fish hold measurement requirement must be submitted by Tier 1 and Tier 2 qualifiers by December 31, 2012. These timing adjustments were made to allow adequate time for applicants and qualifiers to gather and submit the required application materials, and to allow for timely processing of applications.

The proposed rule stated that applicants whose vessels sunk, were destroyed, or transferred prior to March 21, 2007, and who are applying to place their mackerel eligibility directly into CPH, could meet the permit issuance requirement if a valid federal mackerel permit was issued at any time between March 21, 2006, and March 21, 2007. This final rule extends this exemption to applicants applying for active permits, as reflected in the regulatory text presented at § 648.4(a)(5)(iii)(c)(1). Accordingly, in this final rule, if a vessel was sunk, destroyed, or transferred before March 21, 2007, and a mackerel permit was not issued to the vessel's replacement as of March 21, 2007, the permit issuance criteria can be met if the vessel was issued a valid permit at any time between March 21, 2006, and March 21, 2007, regardless of if the applicant is applying to place a limited access mackerel permit on an active vessel, or into CPH. The extension of this provision to vessels applying for active limited access mackerel permits is a logical outgrowth of the provision put forward in the proposed rule, and eliminates an otherwise unintended adverse consequence of the proposed language.

The final regulatory text presented in this rule (§§ 628.22, 628.24, 628.25, and 628.26) differs slightly in structure, but not content, from the regulations in the proposed rule. In addition, longfin squid was previously referred to as *Loligo* squid. Due to a recent change in the scientific name of longfin squid from *Loligo pealeii* to *Doryteuthis (Amerigo) pealeii,* the Council will now use the common name ''longfin squid'' in all official documents to avoid confusion. Accordingly, the regulatory text is amended to replace all references to ''*Loligo''* squid with the term ''longfin squid.''

Classification

The Administrator, Northeast Region, NMFS, determined that the amendment implemented by this final rule is necessary for the conservation and management of the MSB fisheries, and that it is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. NMFS, in making that determination, has taken into account the data, views, and comments received during the comment period.

The Council prepared an FEIS for Amendment 11; the FEIS was filed with the Environmental Protection Agency on July 1, 2011 (76 FR 38650). The FEIS describes the impacts of the proposed Amendment 11 measures on the environment. Since most of the measures would determine the level of future participation of permit holders in the mackerel fishery, the majority of the impacts are social and economic. A notice of availability was published on July 6, 2011. In approving Amendment 11 on September 30, 2011, NMFS issued a ROD identifying the selected alternatives. A copy of the ROD is available from NMFS (see **ADDRESSES**).

This rule has been determined to be not significant for purposes of Executive Order 12866.

A FRFA was prepared. The FRFA incorporates the IRFA, a summary of the significant issued raised by the public comments in response to the IRFA, and NMFS' response to those comments, and a summary of the analyses completed to support the action. A copy of the analyses is available from NMFS (see **ADDRESSES**).

A description of the reasons for this action, the objectives of the action, and the legal basis for the final rule is found in Amendment 11 and the preamble to the proposed rule and this final rule.

Statement of Need for This Action

The purpose of this action is to limit capacity in the Atlantic mackerel fishery through the implementation of a tiered limited access program; to update EFH designations for all MSB species; and to establish an allocation for the recreational mackerel fishery.

A Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

Because the implementation of this amendment will affect current and future access to the mackerel resource, the impacts of Amendment 11 are

largely social and economic. The measures will have direct negative economic impacts on vessel owners that do not have a qualifying vessel or that have fished more intensely recently than during the qualifying time period. The ''Comments and Responses'' section of the preamble of this final rule addresses issues relative to the IRFA in that commenters expressed concern directly and indirectly about the economic impacts of the measures and the impacts on small-scale vessel operations. NMFS' assessment of the issues raised in comments and responses is provided in the ''Comments and Responses'' section of the preamble of this final rule and are not repeated here. After taking all public comments into consideration, NMFS approved Amendment 11 on September 30, 2011.

Description and Estimate of Number of Small Entities To Which the Rule Will Apply

The measures in Amendment 11 would primarily affect participants in the mackerel fishery. All of the potentially affected businesses are considered small entities under the standards described in NMFS guidelines, because they have gross receipts that do not exceed $4 million annually. There were 2,331 vessels issued open access mackerel permits in 2010. The Small Business Administration (SBA) size standard for commercial fishing (NAICS code 114111) is $4 million in annual gross receipts. Available data indicate that no single fishing entity earned more than $4 million annually. Although there are likely to be entities that, based on rules of affiliation, would qualify as large business entities, due to lack of reliable ownership affiliation data NMFS cannot apply the business size standard at this time. Data are currently being compiled on vessel ownership that should permit a more refined assessment and determination of the number of large and small entities in the mackerel fishery for future actions. For this action, since available data are inadequate to identify affiliated vessels, each operating unit is considered a small entity for purposes of the RFA, and, therefore, there is no differential impact between small and large entities. Additionally, there are no disproportionate economic impacts on small entities. Section 6.5 in Amendment 11 describes the vessels, key ports, and revenue information for the mackerel fishery, and so that information is not repeated here.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This action contains several new collection-of-information, reporting, and recordkeeping requirements.

There will be an estimated 820 applications for a limited access mackerel permit. With an average processing time of 45 min, the total time burden for this application is 615 hr. Only 410 vessels are expected to qualify and consequently renew their permit via the renewal application each year. The renewal application is estimated to take 30 min on average to process, for a total burden of 205 hr. Up to 30 applicants are expected to appeal the denial of their permit application (other FMPs estimated between 5–7 percent of applications would move on to the appeal stage). The appeals process is estimated to take 2 hr to complete, on average, with a total burden of 60 hr. The 3-yr average total public cost burden for permit applications, appeals, and renewals is $261, which includes postage and copy fees for submissions.

Each hold volume measurement done by a certified marine surveyor is estimated to cost $4,000. An estimated 74 vessels would qualify for either a Tier 1 or Tier 2 limited access mackerel permit, and would be required to submit a hold volume measurement at the time of permit issuance. Roughly 40 vessels are expected to upgrade or replace vessels each year, and would be required to submit a hold volume measurement for the upgraded or replacement vessel. Therefore, annual total average cost over a 3-yr period is estimated to be $258,667 ($98,667 for annualized initial hold volume certifications, plus $160,000 for replacement hold volume certifications), not including travel expenses.

New limited access mackerel vessels would be subject to the same replacement, upgrade, and permit history restrictions as other limited access vessels. Completion of a replacement or upgrade application requires an estimated 3 hr per response. It is estimated that no more than 40 of the 410 vessels possessing these limited access permits will request a vessel replacement or upgrade annually. This resultant burden would be up to 120 hr. Completion of a CPH application requires an estimated 30 min per response. It is estimated that owners of no more than 30 of the 410 vessels possessing a limited access mackerel permit will request a CPH annually. The resultant burden would be up to 15 hr. The total public cost burden for replacement, upgrade, and CPH applications is $140 for postage and copy fees.

An estimated 329 Tier 3 limited access mackerel vessels would be required to submit VTRs on a weekly basis. Completion of a VTR is estimated to take 5 min per submission. The resultant burden would be 1,151.5 hr. The total public cost burden for VTR submission is $5,790.40 for postage.

Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

The following discussion also includes a description of the economic impacts of this action compared to significant non-selected alternatives as required under the RFA for inclusion in the FRFA.

Tiered Limited Access Program

The FEIS estimates the numbers of vessel that would qualify for limited access permits under the different alternatives. In addition to the no action alternative and preferred alternative, there are six alternatives for tiered limited access programs, and two alternatives that would qualify participants in the Atlantic herring fishery for limited access mackerel permits. Information from the dealer weighout database was used to estimate how many vessels would qualify under each of the proposed limited access alternatives. The economic impacts of these alternatives on both individual vessels and the overall capacity of mackerel fleet is described in sections 5.1.4 and 7.5 of the FEIS and are summarized below.

The composition of the qualifying group that results under each of the tiered limited access programs described in this segment changes based on each alternative. In most instances, the quota allocation and trip limit alternatives described below are averages or percentages based on the composition of the qualifying group. Accordingly, the Tier allocation and trip limit alternative sets described below are different for each of the tiered limited access program alternatives.

Under the preferred alternative, 29 vessels would qualify for a Tier 1 permit, 45 vessels would qualify for a Tier 2 permit, and 329 vessels would

qualify for a Tier 3 permit, resulting in a total of 403 vessels that would qualify for the various limited access mackerel permits. The preferred alternative would cap Tier 3 with a maximum allocation of up to 7 percent of the commercial mackerel quota, with no other additional allocations for any other Tiers. The economic impacts of the Tier allocations will be discussed separately from the structure of the limited access program.

The eligibility criteria for a Tier 1 permit in Alternative 1B would have required a vessel to possess a mackerel permit and have landed at least 1,000,000 lb (453.6 mt) in any one year between January 1, 1997, and December 31, 2007. To qualify for a Tier 2 permit, a vessel would have been required to possess a permit and have landed at least 100,000 lb (45.36 mt) between January 1, 1988, and December 31, 2007. To qualify for a Tier 3 permit, a vessel would have been required to possess a permit and have landed at least 25,000 lb (11.34 mt) between January 1, 1988, and December 31, 2007. Under Alternative 1B, 26 vessels would qualify for a Tier 1 permit, 64 vessels would qualify for a Tier 2 permit, and 56 vessels would qualify for a Tier 3 permit, resulting in a total of 146 vessels that would qualify for the various limited access mackerel permits.

The eligibility criteria for a Tier 1 permit in Alternative 1C would have required a vessel to possess a mackerel permit and have landed at least 1,000,000 lb (453.6 mt) in any one year between January 1, 1997, and December 31, 2007. To qualify for a Tier 2 permit, a vessel would have been required to possess a permit and have landed at least 100,000 lb (45.36 mt) between January 1, 1997, and December 31, 2007. To qualify for a Tier 3 permit, a vessel would have been required to possess a permit and have landed at least 1,000 lb (.45 mt) between January 1, 1997, and December 31, 2007. As with the preferred alternative, 1C would have capped Tier 3 with a maximum allocation of up to 7 percent of the commercial mackerel quota, with no other additional allocations for any other Tiers. Under Alternative 1C, 26 vessels would qualify for a Tier 1 permit, 36 vessels would qualify for a Tier 2 permit, and 309 vessels would qualify for a Tier 3 permit, resulting in a total of 371 vessels that would qualify for the various limited access mackerel permits.

The eligibility criteria for a Tier 1 permit in Alternative 1E would have required a vessel to possess a mackerel permit and have landed at least 400,000 lb (181.44 mt) of mackerel in any one year between January 1, 1997, and December 31, 2005. To qualify for a Tier 2 permit, a vessel would have been required to possess a permit and have landed at least 100,000 lb (45.36 mt) of mackerel in any one year between January 1, 1997, and December 31, 2005. To qualify for a Tier 3 permit, a vessel would have been required to possess a permit and have landed at least 25,000 lb (11.34 mt) of mackerel in any one year between January 1, 1997, and December 31, 2007. Under Alternative 1E, 29 vessels would qualify for a Tier 1 permit, 25 vessels would qualify for a Tier 2 permit, and 50 vessels would qualify for a Tier 3 permit, resulting in a total of 104 vessels that would qualify for the various limited access mackerel permits.

The eligibility criteria for a Tier 1 permit in Alternative 1F would have required a vessel to possess a mackerel permit and have landed at least 1,000,000 lb (453.6 mt) in any one year between January 1, 1997, and December 31, 2007. To qualify for a Tier 2 permit, a vessel would have been required to possess a permit and have landed at least 100,000 lb (45.36 mt) between January 1, 1988, and December 31, 2007. To qualify for a Tier 3 permit, a vessel would have been required to possess a permit and have landed at least 10,000 lb (4.5 mt) between January 1, 1988, and December 31, 2007. Under Alternative 1F, 26 vessels would qualify for a Tier 1 permit, 64 vessels would qualify for a Tier 2 permit, and 121 vessels would qualify for a Tier 3 permit, resulting in a total of 211 vessels that would qualify for the various limited access mackerel permits.

Alternative 1G would implement a single-tiered limited access program for which 26 vessels would qualify. The eligibility criteria for a limited access permit would have required a vessel to possess a mackerel permit and have landed at least 1,000,000 lb (453.6 mt) in any one year between January 1, 1997, and December 31, 2007.

The eligibility criteria for a Tier 1 permit in Alternative 1J would have required a vessel to possess a mackerel permit and have landed at least 1,000,000 lb (453.6 mt) of mackerel in any one year between January 1, 1997, and December 31, 2007. To qualify for a Tier 2 permit, a vessel would have been required to possess a permit and have landed at least 100,000 lb (45.36 mt) of mackerel in any one year between March 1, 1994, and December 31, 2007. To qualify for a Tier 3 permit, a vessel would have been required to possess a permit and have landed at least 25,000 lb (11.34 mt) of mackerel in any one year between March 1, 1994, and December 31, 2007. Under Alternative 1J, 26 vessels would qualify for a Tier 1 permit, 55 vessels would qualify for a Tier 2 permit, and 49 vessels would qualify for a Tier 3 permit, resulting in a total of 130 vessels that would qualify for the various limited access mackerel permits.

The number of individual qualifiers resulting from these management alternatives primarily varies based on the start date and end date of the qualifying landings period, and the required landings threshold for each Tier. A comparison of Alternatives 1B and 1C illustrates the effects of different start dates on numbers of qualifiers. Alternative 1C, which has a 1997 start date, results in 42 fewer qualifying vessels (29 fewer vessels in Tier 2, 13 fewer in Tier 3) than Alternative 1B, which has a 1988 start date. While the later start dates result in fewer qualifiers in Tiers 2 and 3, the economic impacts on these individual vessels should not be significant when compared to their recent level of participation in the fishery. Vessels are still placed in a Tier based on their participation in the fishery since 1997, and analysis in Amendment 11 shows that lower Tiers generally derive a small percentage of their revenue (less than 2 percent for all alternatives) from mackerel.

Vessels that had sizable landings in 2006 or 2007 would be most impacted by the use of a 2005 qualifying landings period end date; this can be illustrated by comparing Alternative 1C (2007) and 1E (2005). With the 2007 end date in 1C, there would be 26 Tier 1 vessels and 35 Tier 2 vessels. If the end date is switched to 2005, as in 1E, three Tier 1 vessels and six Tier 2 vessels fall into lower Tiers. These vessels fell into lower Tiers because their best years of participation were more recent. Depending on the trip limits selected for the lower Tiers, these vessels may be negatively impacted by the earlier end date because they would be constrained compared to their recent participation in the mackerel fishery.

The FEIS presents an estimate of the maximum feasible annual capacity for the Tier 1 and Tier 2 vessels projected to qualify in each of proposed alternatives; this estimate indicates the maximum amount of mackerel the fleet could land under the various management alternatives in a single year. Only Tier 1 and Tier 2 were included in the analysis because, with the exception of Alternative 1G, the other tiers in the presented alternatives will be constrained by trip limits or tier allocations. The highest capacity estimates are associated with the no action alternative and Alternative 1G

(202,111 mt). The capacity for the open access vessels is included in the estimate for Alternative 1G because of the relatively high open access trip limit alternatives associated with 1G (20,000—121,000 mt). Alternative 1E restricts capacity the most, and results in a 49-percent reduction in capacity compared to the no action alternative. The least restrictive alternatives (1B and 1F) result in a 35-percent capacity reduction. The preferred alternative (1D) is the second most restrictive, and results in a 47-percent capacity reduction compared to no action. Alternatives with lower capacity, such as the preferred alternative, could provide greater long-term economic benefits to the qualifying fleet if reduced capacity contributes to the continued health of the mackerel resource.

Alternative 1H and 1I would grant Tier 3 permits to limited access Atlantic herring vessels that would not otherwise qualify for a limited access mackerel permit. Alternative 1H would award a Tier 3 permit to vessels with Category A or B herring permits, and Alternative 1I would award Tier 3 permits to vessels with Category A, B, or C herring permits. Individual vessels are known to target both mackerel and Atlantic herring on the same trip. This provision would prevent forced regulatory discards of incidentally captured mackerel on trips primarily targeting Atlantic herring, and would be expected to result in positive economic benefits for the Atlantic herring fleet. The Council ultimately did not select this alternative because it concluded that the preferred open access mackerel possession limit (20,000 lb (9.07 mt) per trip) would be sufficient to prevent regulatory discards. This alternative was not expected to have a large economic impact on the overall mackerel fishery, as this small number of vessels would be granted access to Tier 3, which would be limited by low trip limits or a Tier allocation.

Quota Allocation for Limited Access Tiers

The FEIS describes four alternatives for allocating the commercial mackerel quota between the limited access Tiers. These alternatives were proposed as another mechanism to ensure that each Tier in the limited access program maintained their historical level of participation in the mackerel fishery in the future. The action alternatives would create a shared allocation for Tier 1, Tier 3, and the open access vessels, but allocate Tier 2 the percentage of total landings that Tier 2 landed from 1997–2007 (2B), double the Tier 2 percentage from 1997–2007 (2C), or triple the Tier 2 percentage from 1997–2007 (2D). Alternatives 2C and 2D feature a provision that, if less than half of Tier 2's allocation has been harvested on April 1, would transfer half of the remaining allocation to the Tier 1/Tier 3/open access allocation.

Based on public comment after the Draft Environmental Impact Statement (DEIS) was published, the Council modified alternatives 1C and 1D (preferred) to provide accommodations for smaller, historical participants in the mackerel fishery. These alternatives would result in more Tier 3 qualifiers, and would initially award Tier 3 a fairly high trip limit in order to allow the qualifiers occasional sizeable landings of mackerel. However, these alternatives would also cap Tier 3 at a maximum of 7 percent of the commercial quota, with no additional allocations for any other Tiers. Given the selection of Alternative 1D as preferred, the Council ultimately recommended the no action alternative regarding allocations for Tier 2.

All three action alternatives base the Tier 2 quota on a minimum of 100 percent of the collective landing of potential Tier 2 vessels from 1997–2007. When combined with the tiered limited access alternatives described above, the resulting Tier 2 allocations would range from 3.5 to 3.8 percent of the annual commercial mackerel quota for Alternative 2B; 7.0 to 7.7 percent of the quota for 2C; and 10.5 to 11.5 percent of the quota for 2D. Given the lower 2011 mackerel quotas, these allocations may constrain landings for all Tiers. The quota transfer provisions in 2C and 2D could benefit Tier 1 in that they would help avoid a situation where Tier 1 is closed, but Tier 2 is left open with a significant portion of its allocation unused.

The no action alternative (preferred), which also includes a cap on Tier 3 under preferred Alternative 1D, should not have substantial economic impact on most fishery participants. While Tier 3 would include an estimated 329 vessels with a relatively high trip limit, the Tier would be capped at a maximum of 7 percent of the commercial fishery allocation, so it should not affect the directed fishery. The economic impact of the Tier 2 allocations depends on Tier activity. If fishing opportunities expand for Tier 2, the no action alternative could allow Tier 2 participants to increase their activity, which could negatively impact other Tiers also attempting to access quota. On the other hand, the no action alternative could have negative impacts on Tier 2 if Tier 1 is very active in a given year and accesses a significant amount of the quota before Tier 2 vessels are able, given Tier 1's higher capacity.

Limited Access Trip Limits

Amendment 11 includes five trip limit alternatives in addition to the no action and preferred alternative. The trip limits analyzed in the FEIS are intended to restrict vessels to a range of landings that are characteristic of trips by vessels within a Tier. Under all alternatives, Tier 1 is not constrained by a trip limit, and all other trip limits would be established annually through specifications. The preferred alternative (3F) would initially set the trip limits at 135,000 lb (61.24 mt) for Tier 2; 100,000 lb (45.36 mt) for Tier 3; and 20,000 lb (9.07 mt) for open access. Alternatives 3B, 3C, and 3D would initially set the trip limits for Tier 2, Tier 3, and open access vessels such that 99 percent, 98 percent, and 95 percent of the trips in each would not have been affected, respectively. This would result in initial trip limits ranging from 39,000–553,000 lb (14.6–206.4 mt) for Tier 2; 4,000–100,000 lb (1.5–37.3 mt) for Tier 3; and 1,000–20,000 lb (0.4–7.5 mt) for open access, depending on the selected limited access program. Alternative 3E initially exempts Tier 2 from a trip limit, and sets all other trip limts in the range described in Alternatives 3B–3D. Alternative 3G was designed to be selected with Alternative 1G (single-tiered alternative), and would initially set the open access trip limit in a range calculated for Tier 2 with Alternatives 3B–3D under Alternative 1B (61,000–121,000 lb; 22.8–45.2 mt).

The alternatives analyzed in the FEIS were designed to establish trip limits that would be higher than historical landings for a majority of the fleet. Accordingly, none of the proposed trip limits are expected to have a negative economic impact on most of the mackerel fleet. In addition, the Tiers with trip limits typically derive a small percentage of their revenue from mackerel (less than 2 percent), so the trip limits are not expected to limit the contribution of mackerel to these vessels' annual revenue. In the event that mackerel availability increases in the future, the trip limits will benefit all mackerel fishery participants in that they will keep vessels in one Tier from significantly expanding effort to the point that their activity is characteristic of a higher Tier; put another way, trip limits could reduce additional capitalization, which could have long-term economic benefits if lower fishery capacity helps sustain the mackerel resource.

Limited Access Permit Provisions

Amendment 11 includes most of the provisions adopted in other limited access fisheries in the Northeast Region to govern the initial qualification process, future ownership changes, and vessel replacements. For the most part, these provisions have no direct economic impact on applicants that qualify for limited access mackerel permits. The nature of a limited access program requires rules for governing the transfer of limited access fishing permits. The procedures have been relatively standard for previous limited access programs, which makes it easier for a vessel owner issued permits for several limited access fisheries to undertake vessel transactions. The standard provisions adopted in Amendment 11 are those governing change in ownership; replacement vessels; CPH; abandonment or voluntary relinquishment of permits; and appeal and denial of permits. This action would also allow a vessel owner to retain an open access mackerel fishing history prior to the implementation of Amendment 11 to be eligible for issuance of a mackerel permit based on the eligibility of the vessel that was sold, even if the vessel was sold with other limited access permits.

The economic impacts of the limited access permit provisions are analyzed in section 7.5.4 of the Amendment 11 document. The preferred alternative that requires hold volume measurements for Tier 1 and Tier 2 vessels would cost qualifiers for these permits an estimated $4,000 per vessel, not including travel expenses, and would prevent such vessels from increasing hold volume by more than 10 percent through refitting or replacement. This provision, and other provisions that restrict vessel upgrades, may constrain future business opportunities for vessels with immediate plans for vessel refitting or replacement. However, these restrictions may have long-term benefits to fishery participants by limiting capitalization in the mackerel fishery. The proposed regulations regarding qualification with retained vessel histories may have positive economic impacts for participants that sold their vessel but retained their mackerel fishing history. However, this provision could result in more vessels qualifying for mackerel permits, which may result in increased fishery capitalization. This could have a negative impact on the mackerel fleet if any additional capitalization impacts the sustained health of the mackerel resource. The preferred alternative requiring weekly VTR submissions from Tier 3 vessels is expected to cost an additional total of $5,790.40 annually in postage for all qualifiers.

EFH Updates

EFH designations identify the geographic domain where fishery management measures could be established to minimize the adverse impacts of fishing and non-fishing activities on MSB species. The no action alternative would maintain the current text and map designations for EFH for all MSB species and life stages. The preferred alternative would designate as EFH the area associated with 90 percent of the cumulative geometric mean catches for non-overfished species, and the area associated with 95 percent of the cumulative geometric mean catches for unknown or overfished species. The three non-preferred alternatives vary slightly from the preferred, and include: (1) 75 percent area for non-overfished species, 90 percent for unknown or overfished species; (2) 95 percent area for non-overfished species, 100 percent for unknown or overfished species; and (3) 100 percent for all species.

With the exception of egg life stage for longfin squid, all of the MSB species are pelagic and have life stages that inhabit the water column. Because the fishing gears that have the potential to adversely impact EFH are bottom-tending, the EFH for MSB species is not vulnerable to fishing impacts. None of the EFH alternatives analyzed in Amendment 11 would result in regulations affecting fishing activity. Accordingly, none of analyzed alternatives are expected to have negative economic impact on the fishing industry. Overall, the preferred alternative would allow for more effective consultations on oversight of EFH when compared to current EFH definitions, which could have positive impacts on the MSB resource.

Recreational Mackerel Allocation

The commercial fishery for mackerel currently closes when it reaches 90 percent of the total mackerel quota (commercial plus recreational). It is assumed that the recreational fishery will harvest 15,000 mt of the commercial quota each year, regardless of the total commercial quota, but there is no hard allocation for the recreational fishery. The no action alternative would maintain the assumption that the recreational mackerel fishery could harvest 15,000 mt of the commercial quota. If the mackerel fishery is closed at 90 percent of the commercial quota, and the recreational fishery was actually able to harvest the assumed 15,000 mt, the mackerel quota would be exceeded. For example, the commercial mackerel quota for the 2011 fishing year is 46,779 mt. If the commercial mackerel fishery is closed when 90 percent of this quota is attained (42,101 mt), and the recreational mackerel fishery has harvested the assumed 15,000 mt, then the mackerel quota would be exceeded by 22 percent (42,101 mt + 15,000 mt = 57,101 mt). Mackerel quota overages can compromise the sustainability of the resource, resulting in negative long-term economic impacts on the fishery.

The preferred alternative would designate an allocation for the recreational mackerel fishery that corresponds to the proportion of total U.S. landings that were accounted for by the recreational fishery from 1997–2007 times 1.5 (6.2 percent of total U.S. mackerel landings). Other alternatives include an allocation equal to the proportion of U.S. landings accounted for by the recreational mackerel fishery during this period (4.1 percent), and two times the proportion from this period (8.2 percent).

The allocation is unlikely to constrain the current operations of the recreational mackerel fishery. Recreational landings from 2000–2009 ranged from 530–1,633 mt, with average recreational landings of 774 mt from 2007–2009. Under the preferred alternative, the recreational sector would have received an allocation of 2,900 mt in 2011 (6.2 percent of 46,779 mt). Given recent reduced mackerel quotas, the preferred recreational mackerel allocation could constrain the commercial mackerel fishery compared to the no action alternative. However, the constraint on the commercial fishery is more related to the overall quota than to any of the potential recreational allocations considered in Amendment 11.

At-Sea Processing

Finally, Amendment 11 considered the establishment of a cap for at-sea processing via transfers for the mackerel fishery. The action alternatives included caps on at-sea processing initially set equal to 7 percent, 14 percent, 21 percent, 50 percent, or 75 percent of the mackerel initial optimum yield (IOY), with the cap set annually through specifications. Though there has not been at-sea processing for mackerel by mother ship-type processors since the foreign fishery ended in the early 1990s, the Council developed this set of alternatives in response to public comment about the potential impacts if large-scale at-sea processing of mackerel were to commence in the future. In particular, commenters noted that, if there were significant amounts of at-sea

mackerel processing, the disruption of the supply of mackerel to land-based processors could have negative economic impacts on fishing communities.

There is little information available about the possible impacts of at-sea processing in the mackerel fishery. Under the preferred no action alternative, if at-sea processing were to become significant for mackerel, an unlimited portion of the mackerel market share could be transferred to at-sea processors. Land-based mackerel processors, and the shoreside communities in which they reside, would be impacted to the extent that mackerel processing shifts to the at-sea operations. Limiting at-sea processing (action alternatives) could have economic benefits by ensuring a portion of the mackerel supply would still be available to land-based mackerel processors.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide was prepared. The guide will be sent to all vessels owners that hold permits administered by the NMFS Northeast Regional Office. In addition, copies of this final rule and guide (*i.e.,* permit holder letter) are available from the Regional Administrator and are also available from NMFS, Northeast Region (see **ADDRESSES**).

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: November 2, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 648.4, paragraph (a)(5)(iii) is revised, and paragraph (c)(2)(vii) is added to read as follows:

§ 648.4 Vessel permits.

(a) * * *

(5) * * *

(iii) *Limited access Atlantic mackerel permits.* (A) *Vessel size restriction.* A vessel of the United States is eligible for and may be issued an Atlantic mackerel permit to fish for, possess, or land Atlantic mackerel in or from the EEZ, except for any vessel that is greater than or equal to 165 ft (50.3 m) in length overall (LOA), or greater than 750 gross registered tons (680.4 mt), or the vessel's total main propulsion machinery is greater than 3,000 horsepower. Vessels that exceed the size or horsepower restrictions may seek to obtain an at-sea processing permit specified in § 648.6(a)(2)(i).

(B) *Limited access mackerel permits.* A vessel of the United States that fishes for, possesses, or lands more than 20,000 lb (7.46 mt) of mackerel per trip, except vessels that fish exclusively in state waters for mackerel, must have been issued and carry on board one of the limited access mackerel permits described in paragraphs (a)(5)(iii)(B)(*1*) through (*3*) of this section, including both vessels engaged in pair trawl operations.

(*1*) *Tier 1 Limited Access Mackerel Permit.* A vessel may fish for, possess, and land mackerel not subject to a trip limit, provided the vessel qualifies for and has been issued this permit, subject to all other regulations of this part.

(*2*) *Tier 2 Limited Access Mackerel Permit.* A vessel may fish for, possess, and land up to 135,000 lb (50 mt) of mackerel per trip, provided the vessel qualifies for and has been issued this permit, subject to all other regulations of this part.

(*3*) *Tier 3 Limited Access Mackerel Permit.* A vessel may fish for, possess, and land up to 100,000 lb (37.3 mt) of mackerel per trip, provided the vessel qualifies for and has been issued this permit, subject to all other regulations of this part.

(C) *Eligibility criteria for mackerel permits.* A vessel is eligible for and may be issued a Tier 1, Tier 2, or Tier 3 Limited Access Mackerel Permit if it meets the permit history criteria in paragraph (a)(5)(iii)(C)(*1*) of this section and the relevant landings requirements specified in paragraphs (a)(5)(iii)(C)(*2*) through (*4*) of this section. The permit criteria and landings requirement must either be derived from the same vessel, or joined on a vessel through replacement prior to March 21, 2007.

(*1*) *Permit history criteria for Limited Access Mackerel Permits.* (*i*) The vessel must have been issued a Federal mackerel permit that was valid as of March 21, 2007. The term ''as of'' means that the vessel must have had a valid mackerel permit on March 21, 2007.

(*ii*) The vessel is replacing a vessel that was issued a Federal mackerel permit that was valid as of March 21, 2007. To qualify as a replacement vessel, the replacement vessel and the vessel being replaced must both be owned by the same vessel owner; or if the vessel being replaced was sunk or destroyed, the vessel owner must have owned the vessel being replaced at the time it sunk or was destroyed; or, if the vessel being replaced was sold to another person, the vessel owner must provide a copy of a written agreement between the buyer of the vessel being replaced and the owner/seller of the vessel, documenting that the vessel owner/seller retained the mackerel permit and all mackerel landings history.

(*iii*) If the vessel sank, was destroyed, or was transferred before March 21, 2007, and a mackerel permit was not issued to a replacement vessel as of March 21, 2007, the permit issuance criteria may be satisfied if the vessel was issued a valid Federal mackerel permit at any time between March 21, 2006, and March 21, 2007.

(*2*) *Landings criteria for Limited Access Mackerel Permits.* (*i*) *Tier 1.* The vessel must have landed at least 400,000 lb (149.3 mt) of mackerel in any one calendar year between January 1, 1997, and December 31, 2005, as verified by dealer reports submitted to NMFS or documented through valid dealer receipts, if dealer reports were not required by NMFS. The owners of vessels that fished in pair trawl operations may provide landings information as specified in paragraph (a)(5)(iii)(C)(*2*)(*iv*) of this section. Landings made by a vessel that is being replaced may be used to qualify a replacement vessel consistent with the requirements specified in paragraph (a)(5)(iii)(C)(*1*)(*ii*) of this section.

(*ii*) *Tier 2.* The vessel must have landed at least 100,000 lb (37.3 mt) of mackerel in any one calendar year between March 1, 1994, and December 31, 2005, as verified by dealer reports submitted to NMFS or documented through valid dealer receipts, if dealer reports were not required by NMFS. The owners of vessels that fished in pair trawl operations may provide landings information as specified in paragraph (a)(5)(iii)(C)(*2*)(*iv*) of this section. Landings made by a vessel that is being replaced may be used to qualify a

replacement vessel consistent with the requirements specified in paragraph (a)(5)(iii)(C)(*1*)(*ii*) of this section.

(*iii*) *Tier 3.* The vessel must have landed at least 1,000 lb (0.4 mt) of mackerel in any one calendar year between March 1, 1994, and December 31, 2005, as verified by dealer reports submitted to NMFS or documented through valid dealer receipts, if dealer reports were not required by NMFS. The owners of vessels that fished in pair trawl operations may provide landings information as specified in paragraph (a)(5)(iii)(C)(*2*)(*iv*) of this section. Landings made by a vessel that is being replaced may be used to qualify a replacement vessel consistent with the requirements specified in paragraph (a)(5)(iii)(C)(*1*)(*ii*) of this section.

(*iv*) *Landings criteria for vessels using landings from pair trawl operations.* To qualify for a limited access permit using landings from pair trawl operations, the owners of the vessels engaged in that operation must agree on how to divide such landings between the two vessels and apply for the permit jointly, as supported by the required NMFS dealer reports or signed dealer receipts.

(*3*) *CPH.* A person who does not currently own a fishing vessel, but owned a vessel that satisfies the permit eligibility requirement in paragraphs (a)(5)(iii)(B)(*1*) and (*2*) of this section that has sunk, been destroyed, or transferred to another person without its fishing and permit history, and that has not been replaced, may apply for and receive a CPH. A CPH allows for a replacement vessel to obtain the relevant limited access mackerel permit if the fishing and permit history of such vessel has been retained lawfully by the applicant as specified in paragraph (a)(5)(iii)(C)(*1*)(*ii*) of this section. If the vessel sank, was destroyed, or was transferred before March 21, 2007, the permit issuance criteria may be satisfied if the vessel was issued a valid Federal mackerel permit at any time between March 21, 2006, and March 21, 2007.

(D) *Application/renewal restrictions.* See paragraph (a)(1)(i)(B) of this section. Applications for a limited access mackerel permit described in paragraph (a)(5)(iii) of this section must be postmarked no later than February 28, 2013. Applications for limited access mackerel permits that are not postmarked before February 28, 2013, will not be processed because of this regulatory restriction, and returned to the sender with a letter explaining the reason for its return.

(E) *Qualification restrictions.* (*1*) See paragraph (a)(1)(i)(C) of this section. The following restrictions in paragraphs (a)(5)(iii)(E)(*2*) and (*3*) of this section are applicable to limited access mackerel permits.

(*2*) Mackerel landings history generated by separate owners of a single vessel at different times during the qualification period for limited access mackerel permits may be used to qualify more than one vessel, provided that each owner applying for a limited access mackerel permit demonstrates that he/she created distinct fishing histories, that such histories have been retained, and if the vessel was sold, that each applicant's eligibility and fishing history is distinct. In such a case, each applicant would still need to have been issued a valid mackerel permit as of March 21, 2007, in order to create a full eligibility, as detailed in paragraph (a)(5)(iii)(C) of this section.

(*3*) A vessel owner applying for a limited access mackerel permit who sold or transferred a vessel with non-mackerel limited access permits, as specified in paragraph (a)(1)(i)(D) of this section, and retained only the mackerel permit and landings history of such vessel as specified in paragraph (a)(1)(i)(D) of this section, before April 3, 2009, may use the mackerel history to qualify a different vessel for the initial limited access mackerel permit, regardless of whether the history from the sold or transferred vessel was used to qualify for any other limited access permit. Such eligibility may be used if the vessel for which the initial limited access mackerel permit has been submitted meets the upgrade restrictions described at paragraph (a)(5)(iii)(H) of this section. Applicants must be able to provide baseline documentation for both vessels in order to be eligible to use this provision.

(F) *Change of ownership.* See paragraph (a)(1)(i)(D) of this section.

(G) *Replacement vessels.* See paragraph (a)(1)(i)(E) of this section.

(H) *Vessel baseline specification.* (*1*) In addition to the baseline specifications specified in paragraph (a)(1)(i)(H) of this section, the volumetric fish hold capacity of a vessel at the time it was initially issued a Tier 1 or Tier 2 limited access mackerel permit will be considered a baseline specification. The fish hold capacity measurement must be certified by an individual credentialed as a Certified Marine Surveyor with a fishing specialty by the National Association of Marine Surveyors (NAMS) or from an individual credentialed as an Accredited Marine Surveyor with a fishing specialty by the Society of Accredited Marine Surveyors (SAMS). Vessels that are sealed by the Maine State Sealer of Weights and Measures will also be deemed to meet this requirement. Owners whose vessels qualify for a Tier 1 or Tier 2 mackerel permit must submit a certified fish hold capacity measurement to NMFS by December 31, 2012, or with the first vessel replacement application after a vessel qualifies for a Tier 1 or Tier 2 mackerel permit, whichever is sooner.

(*2*) If a mackerel CPH is initially issued, the vessel that provided the CPH eligibility establishes the size baseline against which future vessel size limitations shall be evaluated, unless the applicant has a vessel under contract prior to the submission of the mackerel limited access application. The replacement application to move permits onto the contracted vessel must be received by December 31, 2013. If the vessel that established the CPH is less than 20 ft (6.09 m) in length overall, then the baseline specifications associated with other limited access permits in the CPH suite will be used to establish the mackerel baseline specifications. If the vessel that established the CPH is less than 20 ft (6.09 m) in length overall, the limited access mackerel eligibility was established on another vessel, and there are no other limited access permits in the CPH suite, then the applicant must submit valid documentation of the baseline specifications of the vessel that established the eligibility. The hold capacity baseline for such vessels will be the hold capacity of the first replacement vessel after the permits are removed from CPH. Hold capacity for the replacement vessel must be measured pursuant to paragraph (a)(5)(iii)(H)(*1*) of this section.

(I) *Upgraded vessel.* See paragraph (a)(1)(i)(F) of this section. In addition, for Tier 1 and Tier 2 limited access mackerel permits, the replacement vessel's volumetric fish hold capacity may not exceed by more than 10 percent the volumetric fish hold capacity of the vessel's baseline specifications. The modified fish hold, or the fish hold of the replacement vessel, must be resurveyed by a surveyor (accredited as in paragraph (a)(5)(iii)(H) of this section) unless the replacement vessel already had an appropriate certification.

(J) *Consolidation restriction.* See paragraph (a)(1)(i)(G) of this section.

(K) *Confirmation of permit history.* See paragraph (a)(1)(i)(J) of this section.

(L) *Abandonment or voluntary relinquishment of permits.* See paragraph (a)(1)(i)(K) of this section.

(M) *Appeal of permit denial.* (*1*) *Eligibility.* Any applicant eligible to apply for a limited access mackerel permit who is denied such permit may appeal the denial to the Regional Administrator within 30 days of the notice of denial.

(*2*) *Appeal review.* Applicants have two opportunities to appeal the denial of a limited access mackerel permit. The review of initial appeals will be conducted under the authority of the Regional Administrator at NMFS's Northeast Regional Office. The Regional Administrator shall appoint a hearing officer for review of second denial appeals.

(*i*) An appeal of the denial of an initial permit application (first level of appeal) must be made in writing to NMFS Northeast Regional Administrator. Appeals must be based on the grounds that the information used by the Regional Administrator in denying the permit was incorrect. The only items subject to appeal are the accuracy of the amount of landings, and the correct assignment of landings to a vessel and/or permit holder. Appeals must be submitted to the Regional Administrator, postmarked no later than 30 days after the denial of an initial limited access mackerel permit application. The appeal shall set forth the basis for the applicant's belief that the Regional Administrator's decision was made in error. The appeal must be in writing, must state the specific grounds for the appeal, and include information to support the appeal. The appellant may also request a letter of authorization (LOA), as described in paragraph (a)(5)(iii)(M)(*3*) of this section. If the appeal of the denial of the permit application is not made within 30 days, the denial of the permit application shall constitute the final decision of the Department of Commerce. The appeal will not be reviewed without submission of information in support of the appeal. The Regional Administrator will appoint a designee to make the initial decision on the appeal.

(*ii*) Should the appeal of the denial of the permit application be denied, the applicant may request a hearing to review the Regional Administrator's initial decision denying the first level appeal (second level of appeal). Such a request must be in writing, postmarked no later than 30 days after the appeal decision, must state the specific grounds for the hearing request, and must include information to support the hearing request. If the request for a hearing to review of the decision denying the first level of appeal is not made within 30 days, the initial decision will constitute the final decision of the Department of Commerce. If the hearing request is submitted without information in support of the request, the appeal will not be reviewed in a hearing, and the initial decision will constitute the final decision of the Department of Commerce. The Regional Administrator will appoint a hearing officer or the hearing process may take place within the National Appeals program. The hearing officer shall make findings and a recommendation to the Regional Administrator, which shall be advisory only. The Regional Administrator's decision is the final decision of the Department of Commerce.

(*3*) A vessel denied a limited access mackerel permit may fish for mackerel while the decision on the appeal is pending within NMFS, provided that the denial has been appealed, the appeal is pending, and the vessel has on board a letter from the Regional Administrator authorizing the vessel to fish under the limited access category for which the applicant has submitted an appeal. A request for an LOA must be made when submitting an appeal of the denial of the permit application. The Regional Administrator will issue such a letter for the pending period of any appeal. The LOA must be carried on board the vessel. If the appeal is finally denied, the Regional Administrator shall send a notice of final denial to the vessel owner; the authorizing letter becomes invalid 5 days after the receipt of the notice of denial, but no later than 10 days from the date of the letter of denial.

(iv) *Atlantic mackerel incidental catch permits.* Any vessel of the United States may obtain a permit to fish for or retain up to 20,000 lb (7.46 mt) of Atlantic mackerel as an incidental catch in another directed fishery, provided that the vessel does not exceed the size restrictions specified in paragraph (a)(5)(iii)(A) of this section. The incidental catch allowance may be revised by the Regional Administrator based upon a recommendation by the Council following the procedure set forth in § 648.21.

(v) *Party and charter boat permits.* The owner of any party or charter boat must obtain a permit to fish for, possess, or retain in or from the EEZ mackerel, squid, or butterfish while carrying passengers for hire.

* * * * *

(c) * * *

(2) * * *

(vii) The owner of a vessel that has been issued a Tier 1 or Tier 2 limited access mackerel must submit a volumetric fish hold certification measurement, as described in paragraph (a)(5)(iii)(H) of this section, with the permit renewal application for the 2013 fishing year.

* * * * *

■ 3. In § 648.7, paragraph (f)(2)(i) is revised to read as follows:

§ 648.7 Recordkeeping and reporting requirements.

* * * * *

(f) * * *

(2) * * *

(i) For any vessel not issued a NE multispecies, Atlantic herring permit, or Tier 3 Limited Access mackerel permit, fishing vessel log reports, required by paragraph (b)(1)(i) of this section, must be postmarked or received by NMFS within 15 days after the end of the reporting month. If no fishing trip is made during a particular month for such a vessel, a report stating so must be submitted, as instructed by the Regional Administrator. For any vessel issued a NE multispecies permit, Atlantic herring permit, or a Tier 3 Limited Access mackerel permit, fishing vessel log reports must be postmarked or received by midnight of the first Tuesday following the end of the reporting week. If no fishing trip is made during a reporting week for such a vessel, a report stating so must be submitted and received by NMFS by midnight of the first Tuesday following the end of the reporting week, as instructed by the Regional Administrator. For the purposes of this paragraph (f)(2)(i), the date when fish are offloaded will establish the reporting week or month that the VTR must be submitted to NMFS, as appropriate. Any fishing activity during a particular reporting week (*i.e.,* starting a trip, landing, or offloading catch) will constitute fishing during that reporting week and will eliminate the need to submit a negative fishing report to NMFS for that reporting week. For example, if a vessel issued a NE multispecies permit, Atlantic herring permit, or Tier 3 Limited Access Mackerel Vessel begins a fishing trip on Wednesday, but returns to port and offloads its catch on the following Thursday (*i.e.,* after a trip lasting 8 days), the VTR for the fishing trip would need to be submitted by midnight Tuesday of the third week, but a negative report (*i.e.,* a ''did not fish'' report) would not be required for either earlier week.

* * * * *

■ 4. In § 648.14, paragraph (g)(1)(iii) is removed; paragraphs (g)(2)(ii)(C), (D), and (E) are revised, and paragraphs (g)(2)(ii)(F), (g)(2)(iii)(D) and (g)(2)(iv) are added to read as follows:

§ 648.14 Prohibitions.

* * * * *

(g) * * *

(2) * * *

(ii) * * *

(C) Possess more than the incidental catch allowance of mackerel, unless

issued a Limited Access mackerel permit.

(D) Take, retain, possess, or land mackerel, squid, or butterfish in excess of a possession limit specified in § 648.26.

(E) Possess 5,000 lb (2.27 mt) or more of butterfish, unless the vessel meets the minimum mesh requirements specified in § 648.23(a).

(F) Take, retain, possess, or land mackerel, squid, or butterfish after a total closure specified under § 648.24.

* * * * *

(iii) * * *

(D) If fishing with midwater trawl or purse seine gear, fail to comply with the requirements of § 648.80(d) and (e).

* * * * *

(iv) *Observer requirements for longfin squid fishery.* Fail to comply with any of the provisions specified in § 648.27.

* * * * *

■ 6. In § 648.22, paragraphs (a)(3), (b)(2)(iv)(A) introductory text, (c)(3), (c)(6), and (c)(9) are revised to read as follows:

§ 648.22 Atlantic mackerel, squid, and butterfish specifications.

(a) * * *

(3) ACL; commercial ACT, including RSA, DAH, Tier 3 allocation (up to 7 percent of the DAH), DAP; JVP if any; TALFF, if any; and recreational ACT, including RSA for mackerel; which, subject to annual review, may be specified for a period of up to 3 years. The Monitoring Committee may also recommend that certain ratios of TALFF, if any, for mackerel to purchases of domestic harvested fish and/or domestic processed fish be established in relation to the initial annual amounts.

* * * * *

(b) * * *

(2) * * *

(iv) * * *

(A) *Commercial sector ACT.* Commercial ACT is composed of RSA, DAH, Tier 3 allocation (up to 7 percent of DAH), dead discards, and TALFF, if any. RSA will be based on requests for research quota as described in paragraph (g) of this section. DAH, Tier 3 allocation (up to 7 of the DAH), DAP, and JVP will be set after deduction for RSA, if applicable, and must be projected by reviewing data from sources specified in paragraph (b) of this section and other relevant data, including past domestic landings, projected amounts of mackerel necessary for domestic processing and for joint ventures during the fishing year, projected recreational landings, and other data pertinent for such a projection. The JVP component of DAH is the portion of DAH that domestic processors either cannot or will not use. Economic considerations for the establishment of JVP and TALFF include:

* * * * *

(c) * * *

(3) The amount of longfin squid, *Illex,* and butterfish that may be retained and landed by vessels issued the incidental catch permit specified in § 648.4(1)(5)(ii), and the amount of mackerel that may be retained, possessed and landed by any of the limited access mackerel permits described at § 648.4(1)(5)(iii) and the incidental mackerel permit at § 648.4(1)(5)(iv).

* * * * *

(6) Commercial seasonal quotas/closures for longfin squid and *Illex,* and allocation for the Limited Access Mackerel Tier 3.

* * * * *

(9) Recreational allocation for mackerel.

* * * * *

■ 7. In § 648.24, paragraph (b)(1) is revised to read as follows:

§ 648.24 Fishery closures and accountability measures.

* * * * *

(b) * * *

(1) *Mackerel commercial sector EEZ closure.* (i) NMFS will close the commercial mackerel fishery in the EEZ when the Regional Administrator projects that 90 percent of the mackerel DAH will be harvested, if such a closure is necessary to prevent the DAH from being exceeded. The closure of the directed fishery shall be in effect for the remainder of that fishing period, with incidental catches allowed as specified in § 648.26. When the Regional Administrator projects that the DAH for mackerel will be landed, NMFS will close the mackerel fishery in the EEZ and the incidental catches specified for mackerel at § 648.26 will be prohibited.

(ii) NMFS will close the Tier 3 commercial mackerel fishery in the EEZ when the Regional Administrator projects that 90 percent of the Tier 3 mackerel allocation will be harvested, if such a closure is necessary to prevent the DAH from being exceeded. The closure of the Tier 3 commercial mackerel fishery will be in effect for the remainder of that fishing period, with incidental catches allowed as specified in § 648.26.

* * * * *

■ 8. In § 648.25, paragraph (a)(1) is revised to read as follows:

§ 648.25 Atlantic mackerel, squid, and butterfish framework adjustments to management measures.

(a) * * *

(1) *Adjustment process.* The MAFMC shall develop and analyze appropriate management actions over the span of at least two MAFMC meetings. The MAFMC must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and biological analyses, and the opportunity to comment on the proposed adjustment(s) at the first meeting and prior to and at the second MAFMC meeting. The MAFMC's recommendations on adjustments or additions to management measures must come from one or more of the following categories: Adjustments within existing ABC control rule levels; adjustments to the existing MAFMC risk policy; introduction of new AMs, including sub-ACTs; minimum fish size; maximum fish size; gear restrictions; gear requirements or prohibitions; permitting restrictions, recreational allocation, recreational possession limit; recreational seasons; closed areas; commercial seasons; commercial trip limits; commercial quota system, including commercial quota allocation procedure and possible quota set-asides to mitigate bycatch; recreational harvest limit; annual specification quota setting process; FMP Monitoring Committee composition and process; description and identification of EFH (and fishing gear management measures that impact EFH); description and identification of habitat areas of particular concern; overfishing definition and related thresholds and targets; regional gear restrictions; regional season restrictions (including option to split seasons); restrictions on vessel size (LOA and GRT) or shaft horsepower; changes to the Northeast Region SBRM (including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs); any other management measures currently included in the FMP, set aside quota for scientific research, regional management, and process for inseason adjustment to the annual specification. Measures contained within this list that require significant departures from previously contemplated measures or that are otherwise introducing new concepts may require amendment of the FMP instead of a framework adjustment.

* * * * *

■ 9. In § 648.26, paragraph (a) is revised to read as follows:

§ 648.26 Mackerel, squid, and butterfish possession restrictions.

(a) *Atlantic mackerel.* (1) A vessel must be issued a valid limited access mackerel permit to fish for, possess, or land more than 20,000 lb (9.08 mt) of Atlantic mackerel from or in the EEZ per trip, provided that the fishery has not been closed because 90 percent of the DAH has been harvested, as specified in § 648.24(b)(1)(i).

(i) A vessel issued a Tier 1 Limited Access Mackerel Permit is authorized to fish for, possess, or land Atlantic mackerel with no possession restriction in the EEZ per trip, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours, provided that the fishery has not been closed because 90 percent of the DAH has been harvested, as specified in § 648.24(b)(1)(i).

(ii) A vessel issued a Tier 2 Limited Access Mackerel Permit is authorized to fish for, possess, or land up to 135,000 lb (61.23 mt) of Atlantic mackerel in the EEZ per trip, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours, provided that the fishery has not been closed because 90 percent of the DAH has been harvested, as specified in § 648.24(b)(1)(i).

(iii) A vessel issued a Tier 3 Limited Access Mackerel Permit is authorized to fish for, possess, or land up to 100,000 lb (45.36 mt) of Atlantic mackerel in the EEZ per trip, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours, provided that the fishery has not been closed because 90 percent of the Tier 3 allocation has been harvested, or 90 percent of the DAH has been harvested, as specified in § 648.22(b)(1)(i) and (ii).

(iv) A vessel issued an open access mackerel permit may fish for, possess, or land up to 20,000 lb (9.08 mt) of Atlantic mackerel in the EEZ per trip, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours.

(v) Both vessels involved in a pair trawl operation must be issued a valid mackerel permits to fish for, possess, or land Atlantic mackerel in the EEZ. Both vessels must be issued the mackerel permit appropriate for the amount of mackerel jointly possessed by both of the vessels participating in the pair trawl operation.

(2) *Mackerel closure possession restrictions.* (i) *Commercial mackerel fishery.* During a closure of the commercial Atlantic mackerel fishery, including closure of the Tier 3 fishery, vessels issued a Limited Access Mackerel Permit may not fish for, possess, or land more than 20,000 lb (9.08 mt) of Atlantic mackerel per trip at any time, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours.

(ii) [Reserved]

* * * * *

[FR Doc. 2011–28772 Filed 11–4–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 0907301205–0289–02]

RIN 0648–XA805

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Temporary Removal of Herring Trip Limit in Atlantic Herring Management Area 3

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; inseason action.

SUMMARY: NMFS announces temporary removal of the 2,000-lb (907.2 kg) trip limit for the Atlantic herring fishery in Management Area 3 because recent catch data indicate that 95 percent of the sub-annual catch limit in Area 3 has not been fully attained. Vessels issued a Federal Atlantic herring permit may resume fishing for and landing herring, in amounts greater than 2,000 lb (907.2-kg), consistent with their Atlantic herring permit category, effective 0001 hr, November 7, 2011, through 0001 hr, November 10, 2011. At 0001 hr, November 10, 2011, vessels will again be prohibited from fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2-kg) of Atlantic herring per trip or calendar day.

DATES: Effective 0001 hr, November 7, 2011, through 0001 hr, November 10, 2011.

FOR FURTHER INFORMATION CONTACT: Lindsey Feldman, Fishery Management Specialist, (978) 675–2179.

SUPPLEMENTARY INFORMATION: Regulations governing the herring fishery are found at 50 CFR part 648. The regulations require annual specification of the overfishing limit, acceptable biological catch, annual catch limit (ACL), optimum yield, domestic harvest and processing, U.S. at-sea processing, border transfer, and sub-ACLs for each management area. The 2011 Domestic Annual Harvest is 91,200 metric tons (mt); the 2011 sub-ACL allocated to Area 3 is 38,146 mt, and 0 mt of the sub-ACL is set aside for research (75 FR 48874, August 12, 2010).

Section 648.201(a) requires NMFS to monitor catch from the herring fishery in each of the herring management areas, using dealer reports, state data, and other available information, to determine when the catch of herring is projected to reach 95 percent of the management area sub-ACL. When such a determination is made, NMFS is required to prohibit, through publication in the **Federal Register,** herring vessel permit holders from fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2-kg) of herring, per trip or calendar day, in or from the specified management area for the remainder of the closure period. Transiting an area closed to directed fishing with more than 2,000 lb (907.2-kg) of herring on board is allowed under the conditions specified below.

Based upon information indicating that 95 percent of the sub-ACL would be reached by October 3, 2011, NMFS filed a temporary rule effective October 3 through December 31, 2011, that reduced the herring trip limit in Area 3 for all federally permitted herring vessels to 2,000 lb (907.2-kg) per trip or calendar day. The NMFS Northeast Regional Administrator has since determined, based upon the latest dealer reports, data corrections, and other available information, that the herring fleet has not yet taken 95 percent of the sub-ACL, and, as of November 2, 2011, there is approximately 2,026 mt of Atlantic herring quota still available in Area 3. So that the herring fleet is able to harvest closer to 95 percent of the Area 3 sub-ACL, consistent with applicable regulations and trip limits, this action temporarily removes the 2,000 lb (907.2-kg) trip limit implemented on October 3, 2011, and restores the trip limits, if any, in effect before October 3, 2011, until 0001 hr November 10, 2011. Effective 0001 hr, November 7, 2011, through 0001 hrs, November 10, 2011, vessels issued an All Areas or an Areas 2 and 3 Limited Access Herring Permit are authorized to

fish for, possess, or land Atlantic herring with no possession restrictions; vessels issued a Limited Access Incidental Catch Herring Permit are authorized to fish for, possess, or land up to 55,000 lb (25 mt); and vessels issued an open access herring permit may not fish for, possess, or land more than 6,600 lb (3 mt) of Atlantic herring in Area 3.

At 0001 hr November 10, 2011, all federally permitted herring vessels will again be prohibited from fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2-kg) of herring, per trip or calendar day, in or from Area 3, through December 31, 2011. Vessels transiting Area 3 with more than 2,000 lb (907.2-kg) of herring on board may do so, provided such herring was not caught in Area 3 and that all fishing gear is stowed and not available for immediate use, as required by § 648.23(b).

Effective 0001 hr, November 7, 2011, federally permitted dealers are advised that they may purchase more than 2,000 lb (907.2-kg) of Atlantic herring caught in Area 3 by federally permitted vessels until 0001 hr November 10, 2011. At 0001 hrs November 10, 2011, federally permitted dealers will again be prohibited from purchasing herring from federally permitted herring vessels that harvest more than 2,000 lb (907.2-kg) of herring from Area 3, through 2400 hr local time, December 31, 2011.

Classification

This action is taken under 50 CFR part 648 and is exempt from review under E.O. 12866.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be impracticable and contrary to the public interest. This action temporarily removes the 2,000-lb (907.2-kg) herring trip limit in Area 3 from November 7 until November 10, 2011. As of 0001 hr November 10, 2011, the Area 3 trip limit will again be reduced to 2,000 lb (907.2-kg) per trip or calendar day, through December 31, 2011. The Atlantic herring fishery opened for the 2011 fishing year at 0001 hrs on January 1, 2011. The Atlantic herring fleet was prohibited from fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2 mt) per trip or calendar day on October 3, 2011, based on projections that 95 percent of the available Area 3 herring quota had been harvested. Catch data indicating the Atlantic herring fleet did not harvest the full amount of available quota have only very recently become available. If implementation of this temporary removal of the 2,000 lb (907.2-kg) trip limit is delayed to solicit prior public comment, the remaining quota may not be fully harvested before the end of the 2011 fishing year on December 31. If public comment and the 30-day delayed effectiveness period is allowed, this action may re-open the directed herring fishery after the herring have moved out of Area 3.

Given the seasonal nature of the herring fishery, this would make this action ineffective. The AA finds, pursuant to 5 U.S.C. 553(d)(3), good cause to waive the 30-day delayed effectiveness period for the reasons stated above.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 2, 2011.

Steven Thur,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2011–28767 Filed 11–2–11; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

RIN 0648–BA01

[Docket No. 100804324–1265–02]

Fisheries Off West Coast States; Pacific Coast Groundfish Harvest Specifications and Management Measures for the Remainder of the 2011 Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Agency determination.

SUMMARY: NMFS announces that the provisions implemented in a final rule published on May 11, 2011, pursuant to NFMS' emergency authority under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) will remain in effect for the remainder of the 2011 groundfish fishery. The provisions included a new rebuilding plan for petrale sole, revised rebuilding plans for other overfished species, and revised status determination criteria, harvest specifications and a precautionary harvest control rule for assessed flatfish species. This announcement is required in order to maintain the current rebuilding plans, harvest specifications and harvest control rule for assessed flatfish species.

DATES: Effective on November 7, 2011.

ADDRESSES: Background information and documents are available from William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115–0070; or by phone at (206) 526–6150.

FOR FURTHER INFORMATION CONTACT: Sarah Williams, (206) 526–4646; (fax) (206) 526–6736; *Sarah.Williams@noaa.gov*

SUPPLEMENTARY INFORMATION: NMFS published a final rule establishing harvest specifications and management measures for most species (75 FR 27508, May 11, 2011), in part pursuant to NMFS' emergency authority under section 305(c) of the MSA. Specifically, that action amended 50 CFR part 660 to establish new and revised rebuilding plans, establish harvest specifications consistent with those rebuilding plans and new flatfish harvest proxies. Further background information for that action is provided in the preamble text of the May 11, 2011, final rule and in the supporting documents for that action, and is not repeated here.

Opportunity for public comment on the May 11, 2011, final rule was provided. One comment was received on that rule that was not relevant to the emergency provisions.

Therefore, this document announces the agency determination to continue through December 31, 2011, the measures set forth in the May 11, 2011, rule at § 660.40 and Table 2a to part 660, subpart C.

Authority: 16 U.S.C. 1801 *et seq.* and 16 U.S.C. 7001 *et seq.*

Dated: November 2, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2011–28769 Filed 11–4–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126521–0640–02]

RIN 0648–XA812

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the Bering Sea Subarea of the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; modification of a closure.

SUMMARY: NMFS is opening directed fishing for Pacific ocean perch in the Bering Sea subarea of the Bering Sea and Aleutian Islands management area. This action is necessary to fully use the 2011 total allowable catch of Pacific ocean perch specified for the Bering Sea subarea of the Bering Sea and Aleutian Islands management area.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), November 3, 2011, through 2400 hrs, A.l.t., December 31, 2011. Comments must be received at the following address no later than 4:30 p.m., A.l.t., November 17, 2011.

ADDRESSES: You may submit comments on this document, identified by FDMS Docket Number NOAA–NMFS–2011–0268, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *http://www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2011–0268 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on that line.
- *Mail:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.
- *Fax:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to (907) 586–7557.
- *Hand delivery to the Federal Building:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Deliver comments to 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *http://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, (907) 586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands management area (BSAI) exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands management area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed the directed fishery for Pacific ocean perch (POP) in the Bering Sea subarea of the BSAI under § 679.20(d)(1)(iii) on January 1, 2011 (75 FR 11778, March 12, 2010 and 76 FR 11139, March 1, 2011).

NMFS has determined that approximately 3,800 metric tons of POP remain in the directed fishing allowance. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C), and (a)(2)(iii)(D), and to fully utilize the 2011 total allowable catch of POP in the Bering Sea subarea of the BSAI, NMFS is terminating the previous closure and is opening directed fishing for POP in Bering Sea subarea of the BSAI. This will enhance the socioeconomic well-being of harvesters dependent upon POP in this area. The Administrator, Alaska Region considered the following factors in reaching this decision: (1) The current catch of POP in the BSAI and, (2) the harvest capacity and stated intent on future harvesting patterns of vessels participating in this fishery.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B), as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of POP in the Bering Sea subarea of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of November 1, 2011.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Without this inseason adjustment, NMFS could not allow the fishery for POP in the Bering Sea subarea of the BSAI to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until November 17, 2011.

This action is required by § 679.20 and § 679.25 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 2, 2011.

Steven Thur,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2011–28763 Filed 11–2–11; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 76, No. 215
Monday, November 7, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0944; Directorate Identifier 2011–NE–11–AD]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney Division (PW) PW4000 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for PW4000 series turbofan engines. This proposed AD would require replacing the fuel metering unit (FMU), part number (P/N) 50U150, at the next shop visit after the effective date of this proposed AD. This proposed AD was prompted by an engine overspeed event that occurred during taxi and resulted in a high-pressure compressor (HPC) surge and tailpipe fire. We are proposing this AD to prevent engine overspeed on these engines, which could result in an uncontained engine failure and damage to the airplane.

DATES: We must receive comments on this proposed AD by January 6, 2012.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Pratt & Whitney, 400 Main St., East Hartford, CT 06108, phone: (860) 565–8770. You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7125.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: James Gray, Aerospace Engineer, Engine Certification Office, FAA, 12 New England Executive Park, Burlington, MA 01803; *phone:* (781) 238–7742; *fax:* (781) 238–7199; *email: james.e.gray@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–0944; Directorate Identifier 2011–NE–11–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We received a report of an engine overspeed during taxi, which resulted in an HPC surge and tailpipe fire. Although the event was not an uncontained engine failure, engine overspeed events compromise the integrity of the rotor and can lead to an uncontained engine failure. Our investigation concluded that the existing FMU is susceptible to a single-point failure condition in which a complete or nearly complete blockage of the FMU servo wash filter could occur. A blockage in the FMU servo wash filter could result in insufficient hydraulic pressure being available to properly control the FMU and actuator functions. Inability to control the FMU and actuator functions, if not corrected, could result in an engine overspeed and an uncontained engine failure and damage to the airplane.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require replacing the FMU, P/N 50U150, at the next shop visit after the effective date of this proposed AD.

Costs of Compliance

We estimate that this proposed AD affects 750 engines installed on airplanes of U.S. registry. We also estimate that it would take about 3.2 work-hours per product to comply with this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $10,698 per engine. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $8,227,500.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures

the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Pratt & Whitney Division (PW): Docket No. FAA–2011–0944; Directorate Identifier 2011–NE–11–AD.

Comments Due Date

(a) We must receive comments by January 6, 2012.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all PW PW4050, PW4052, PW4056, PW4060, PW4060A, PW4060C, PW4062, PW4062A, PW4152, PW4156, PW4156A, PW4158, PW4160, PW4460, PW4462, and PW4650 turbofan engines, including models with any dash number suffix.

Unsafe Condition

(d) This AD was prompted by an engine overspeed event that occurred during taxi and resulted in a high-pressure compressor surge and tailpipe fire. We are issuing this AD to prevent engine overspeed on these engines, which could result in an uncontained engine failure and damage to the airplane.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Replacement of Fuel Metering Unit (FMU), Part Number (P/N) 50U150

(f) At the next shop visit after the effective date of this AD, remove FMU, P/N 50U150, and install an FMU that has been modified as specified in paragraphs 2.A through 2.C of the Accomplishment Instructions of PW Alert Service Bulletin PW4ENG A73–220, Revision 1, dated May 18, 2011.

Installation Prohibition

(g) Three years from the effective date of this AD, do not install FMU, P/N 50U150, onto any engine.

Definition of Shop Visit

(h) For the purpose of this AD, a shop visit is when the engine is inducted into the shop for any maintenance involving the separation of pairs of major mating engine flanges (lettered flanges). However, the separation of engine flanges solely for the purposes of transporting the engine without subsequent engine maintenance is not an engine shop visit.

Alternative Methods of Compliance (AMOCs)

(i) The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(j) For more information about this AD, contact James Gray, Aerospace Engineer, Engine Certification Office, FAA, 12 New England Executive Park, Burlington, MA 01803; *phone:* (781) 238–7742; *fax:* (781) 238–7199; *email: james.e.gray@faa.gov.*

(k) For service information identified in this AD, contact Pratt & Whitney, 400 Main St., East Hartford, CT 06108; phone: (860) 565–8770. You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7125.

Issued in Burlington, Massachusetts, on October 31, 2011.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2011–28676 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0889; Directorate Identifier 2009–NE–35–AD]

RIN 2120–AA64

Airworthiness Directives; Turbomeca S.A. Arriel 2B and 2B1 Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to all Turbomeca S.A. Arriel 2B and 2B1 turboshaft engines. The existing AD currently requires checking the transmissible torque between the low-pressure (LP) pump impeller and the high-pressure (HP) pump shaft on HP/LP pump hydro-mechanical metering units (HMUs) that do not incorporate Modification TU 147. Since we issued that AD, EASA issued a new AD. This proposed AD would require inspection and possible replacement of the HMU. We are proposing this AD to prevent reduced engine power or, at worst, an uncommanded in-flight shutdown (IFSD), which can result in a forced autorotation landing or accident.

DATES: We must receive comments on this proposed AD by January 6, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Turbomeca, 40220 Tarnos, France; *phone:* 33–05–59–74–

40–00, *fax:* 33–05–59–74–45–15. You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7125.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (*phone:* (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: James Rosa, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *phone:* (781) 238–7152; *fax:* (781) 238–7199; *email: james.rosa@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–0889; Directorate Identifier 2009–NE–35–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On January 21, 2010, we issued AD 2010–03–06, Amendment 39–16189 (75 FR 5689, February 4, 2010), for all Turbomeca Arriel 2B and 2B1 turboshaft engines. That AD requires checking the transmissible torque between the LP pump impeller and the HP pump shaft on HMUs that do not incorporate Turbomeca Modification TU 147. That AD also requires replacing the HMU, if it fails that check, with an HMU that has not incorporated Modification TU 147 but passes the check, or with an HMU that incorporates Modification TU 147. That AD resulted from several events of uncoupling of the LP fuel pump impeller and the HP fuel pump shaft on Arriel 2 engines which do not incorporate modification TU 147. The uncoupling of the LP fuel pump impeller and the HP fuel pump shaft may lead to reduced engine power or, at worst, an uncommanded IFSD, which can result in a forced autorotation landing or accident.

Actions Since Existing AD Was Issued

Since we issued AD 2010–03–06 (75 FR 5689, February 4, 2010), three additional cases of uncoupling of the LP fuel pump impeller and the HP fuel pump shaft have been encountered. However, these failures were in HMUs that were modified to post-TU 147 configuration HMUs, and the investigation indicates that these HMUs that fail the transmissible torque check must also be replaced.

Relevant Service Information

We reviewed Turbomeca Alert Mandatory Service Bulletin (MSB) No. A292 73 2830, Version B, dated July 10, 2009, and Alert MSB No. A292 73 2836, Version A, dated August 17, 2010. The Alert MSBs describe procedures for inspecting and replacing the HMU.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require the checking of the transmissible torque between the LP pump impeller and the HP pump shaft on HMUs. This proposed AD would also require replacing the HMU if it fails the transmissible torque check, with an HMU that is eligible for installation.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 540 engines installed on helicopters of U.S. registry. We also estimate that it would take about 2.5 work-hours per engine to comply with this proposed AD. The average labor rate is $85 per work-hour. Replacement HMUs would cost about $12,000 per engine. Based on these figures, if all of the HMUs were to fail the check, we estimate the cost of the proposed AD on U.S. operators to be $6,594,750.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2010–03–06, Amendment 39–16189 (75 FR 5689, February 4, 2010), and adding the following new AD:

Turbomeca S.A.: Docket No. FAA–2009–0889; Directorate Identifier 2009–NE–35–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by January 6, 2012.

(b) Affected ADs

This AD supersedes AD 2010–03–06, Amendment 39–16189 (75 FR 5689, February 4, 2010).

(c) Applicability

This AD applies to all Turbomeca S.A. Arriel 2B and 2B1 turboshaft engines.

(d) Unsafe Condition

This AD was prompted by three additional cases of uncoupling of the high-pressure/low-pressure (HP/LP) pump hydro-mechanical metering unit (HMU) LP fuel pump impeller and the HP fuel pump shaft, since AD 2010–03–06 (75 FR 5689, February 4, 2010) was issued. However, these failures were in HMUs that were modified to post-TU 147 configuration HMUs. The investigation indicates that these HMUs may also need to be replaced. We are issuing this AD to prevent reduced engine power or, at worst, an uncommanded in-flight shutdown, which can result in a forced autorotation landing or accident.

(e) Compliance

Comply with this AD within the compliance times specified, unless already done.

(1) Check the transmissible torque between the LP fuel pump impeller and the HP fuel pump shaft as follows:

(i) For HMUs that do not incorporate Modification TU 147, check the torque before accumulating 500 engine flight hours (EFH) since March 11, 2010 (the effective date of AD 2010–03–06 (75 FR 5689, February 4, 2010)). Use Paragraph 2 of Turbomeca Alert Mandatory Service Bulletin (MSB) No. A292 73 2830, Version B, dated July 10, 2009, to do the check.

(ii) For HMUs that incorporate Modification TU 147 and which Modification TU 147 was applied on or before March 31, 2010, and the HMUs are not listed in Figures 2 or 3 of Turbomeca Alert MSB No. A292 73 2836, Version A, dated August 17, 2010, check the torque within 750 EFH from the effective date of this AD, but no later than 14 months after the effective date of this AD. Use Paragraph 2 of Turbomeca Alert MSB No. A292 73 2836, Version A, dated August 17, 2010, to do the check.

(2) If the HMU does not pass the torque check, then replace the HMU with an HMU that is eligible for installation.

(f) HMU Reinstallation

Do not install any HMU removed from service by this AD until it has been checked in accordance with Paragraph 2 of Turbomeca Alert MSB No. A292 73 2836, Version A, dated August 17, 2010, or checked in accordance with Paragraph 2 of Turbomeca Alert MSB No. A292 73 2830, Version B, dated July 10, 2009, and found eligible for installation.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

(h) Related Information

(1) For more information about this AD, contact James Rosa, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *phone:* (781) 238–7152; *fax:* (781) 238–7199; *email: james.rosa@faa.gov.*

(2) For service information identified in this AD, contact Turbomeca S.A., 40220 Tarnos, France; phone: 33–05–59–74–40–00, fax: 33–05–59–74–45–15. You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7125.

Issued in Burlington, Massachusetts, on October 28, 2011.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2011–28677 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0755; Directorate Identifier 2010–NE–12–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc (RR) RB211–Trent 800 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an earlier proposed airworthiness directive (AD) for RR RB211–Trent 800 series turbofan engines. That NPRM proposed to revise the Trent 800 Time Limits Manual (TLM) of the Trent 800 engine maintenance manuals (EMMs). That NPRM was prompted by RR reducing the life limits of certain critical engine parts. This action revises that NPRM by proposing to supersede an existing AD to prohibit installation of one certain critical part and to increase the life of another critical part whose lives were previously reduced by that existing AD. We are proposing this supplemental NPRM to prevent the failure of critical rotating parts, which could result in uncontained failure of the engine and damage to the airplane. Because of the extensive changes since the NPRM was issued, we are reopening the comment period to allow the public the chance to comment on these proposed changes.

DATES: We must receive comments on this proposed AD by January 6, 2012.

ADDRESSES: You may send comments using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202)–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE248BJ; *phone:* 011–44–1332–242424; *fax:* 011–44–1332–245418 or *email* from *http://www.rolls-royce.com/contact/civil_team.jsp,* or download the publication from *https://www.aeromanager.com.* You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call (781)–238–7125.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Alan Strom, Aerospace Engineer, Engine

Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *phone:* (781) 238–7143; *fax:* (781) 238–7199; *email: alan.strom@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2010–0755; Directorate Identifier 2010–NE–12–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We issued an NPRM to amend 14 CFR part 39 to include an AD that would apply to RR RB211–Trent 800 series turbofan engines. That NPRM published in the **Federal Register** on August 3, 2010 (75 FR 45560). That NPRM would have revised the TLM of the RB211–Trent 800 EMMs. That NPRM was prompted by RR reducing the life limits of certain critical engine parts. Revision of the critical part lives has been necessary due to actual operational flight profiles not conforming to those assumed at entry into service and is associated with a revised Flight Profile Monitoring methodology introduced by RR. The methodology was originally based on engine thrust rating but is now based on operating shaft speeds.

Actions Since Previous NPRM Was Issued

Since we issued the previous NPRM (75 FR 45560, August 3, 2010), RR requested that we supersede existing AD 2003–16–18, Amendment 39–13271 (68 FR 49344, August 18, 2003). That AD currently requires a life limit for intermediate-pressure (IP) turbine rotor disc, part number (P/N) FK21117, that is lower than the life limit proposed by this supplemental NPRM. Rolls-Royce plc substantiated their proposed increased life of P/N FK21117 by rig test and analysis.

AD 2003–16–18 (68 FR 49344, August 18, 2003) also reduced the life limit for IP turbine rotor discs, P/N FK33083, and all P/N FK33083 IP turbine rotor discs are no longer in service. RR has accordingly reduced the life for P/N FK33083 discs to zero, effectively removing them as a disc approved for installation in any engine. By revising the previous NPRM (75 FR 45560, August 3, 2010) to supersede AD 2003–16–18, as discussed previously, this proposed AD would make these changes to the life of RR IP turbine rotor disc, P/N FK21117, and RR IP turbine rotor disc, P/N FK33083, mandatory. We have also determined that it is unnecessary to incorporate by reference the TLM of the Trent 800 engine EMMs. We can address the unsafe condition identified in this supplemental NPRM by mandating the reduced lives of the affected parts.

Comments

We gave the public the opportunity to comment on the previous NPRM (75 FR 45560, August 3, 2010). We have considered the comments received.

Request To Change Compliance Paragraph (e)(1)

American Airlines and Delta Airlines asked us to change paragraph (e)(1) in the proposed AD from ''(1) Revise the airworthiness limitations section (ALS) * * * Time Limits manual (TLM) dated June 15, 2009'' to ''(1) Revise the airworthiness limitations section (ALS) * * * Time Limits manual (TLM) dated no earlier than June 15, 2009.'' The commenters do not want to be forced to use a TLM dated earlier than the one currently in force.

We partially agree. We agree that a more efficient method of revising the life exists, so we changed this proposed AD to specify the revised part lives in Table 1 in the Compliance section of this proposed AD. We do not agree to the requested wording as it leaves compliance with the AD open to future revisions that do not currently exist. We did not change the proposed AD further as a result of this comment.

Request To Withdraw the NPRM

Delta Airlines asked us to withdraw the NPRM (75 FR 45560, August 3, 2010). Delta Airlines believed the NPRM is redundant because the current TLM already requires using the proposed tasks and life limits.

We do not agree. Although the new life limits are included in the current TLM, the new life limits are reinforced when mandated by an AD. We changed this proposed AD to specify the revised part lives in Table 1 in the Compliance section of this proposed AD.

Request To Supersede the Existing AD 2003–16–18 (68 FR 49344, August 18, 2003)

Rolls-Royce plc asked us to change paragraph (b) of the proposed AD from ''None'' to ''AD 2003–16–18 is superseded by the current AD.''

We agree. We changed paragraph (b) of this proposed AD to state that ''This AD supersedes AD 2003–16–18, Amendment 39–13271 (68 FR 49344, August 18, 2003)''.

Relevant Service Information

Rolls-Royce plc has issued Alert Service Bulletin No. RB.211–72–AE935, Revision 7, dated January 19, 2009. The actions described in this service information are intended to correct the unsafe condition identified in this supplemental NPRM.

FAA's Determination

We are proposing this supplemental NPRM because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. Certain changes described above expand the scope of the previous NPRM (75 FR 45560, August 3, 2010). As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this supplemental NPRM.

Proposed Requirements of the Supplemental NPRM

This supplemental NPRM would reduce the life limits of certain critical engine parts and would supersede AD 2003–16–18, Amendment 39–13271 (68 FR 49344, August 18, 2003).

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 16 RB211–Trent 800 series turbofan engines of U.S. registry. The average labor rate is $85 per work-hour, but no labor cost is associated with this proposed AD because discs are replaced at scheduled maintenance intervals. Prorated cost of parts would cost about $45,000 per engine. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $720,000.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more

detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

(3) Will not affect intrastate aviation in Alaska or;

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2003–16–18, Amendment 39–13271 (68 FR 49344, August 18, 2003), and adding the following new AD:

Rolls-Royce plc: Docket No. FAA–2010–0755; Directorate Identifier 2010–NE–12–AD.

(a) Comments Due Date

We must receive comments by January 6, 2012.

(b) Affected ADs

This AD supersedes AD 2003–16–18, Amendment 39–13271 (68 FR 49344, August 18, 2003).

(c) Applicability

This AD applies to Rolls-Royce plc (RR) RB211–Trent 895–17, 892–17, 892B–17, 884–17, 884B–17, 877–17, and 875–17 turbofan engines.

(d) Unsafe Condition

This AD was prompted by RR reporting changes to the lives of certain life limited rotating parts. We are issuing this AD to prevent the failure of critical rotating parts, which could result in uncontained failure of the engine and damage to the airplane.

(e) Actions and Compliance

Compliance is required within 30 days after the effective date of this AD, unless already done.

(1) After the effective date of this AD, remove from service the parts listed in Table 1 of this AD before exceeding the new life limit indicated:

TABLE 1—REDUCED PART LIVES

Part nomenclature	Part number (P/N)	Life in standard duty cycles	Life in cycles using the HEAVY profile
(i) Intermediate-pressure (IP) Compressor Rotor Shaft	FK24100	8,140	8,140
(ii) IP Compressor Rotor Shaft	FK24496	8,860	8,180
(iii) High-pressure (HP) Compressor Stage 1 to 4 Rotor Discs Shaft	FK24009	4,560	4,460
(iv) HP Compressor Stage 1 to 4 Rotor Discs Shaft	FK26167	6,340	6,000
(v) HP Compressor Stage 1 to 4 Rotor Discs Shaft	FK32580	8,550	6,850
(vi) HP Compressor Stage 1 to 4 Rotor Discs Shaft	FW11590	8,550	6,850
(vii) HP Compressor Stage 1 to 4 Rotor Discs Shaft	FW61622	8,550	6,850
(viii) HP Compressor Stage 5 and 6 Discs and Cone	FK25230	5,000	5,000
(ix) HP Compressor Stage 5 and 6 Discs and Cone	FK27899	5,000	5,000
(x) IP Turbine Rotor Disc	FK21117	11,610	10,400
(xi) IP Turbine Rotor Disc	FK33083	0	0

(f) Installation Prohibition

After the effective date of this AD, do not install any IP turbine rotor discs, P/N FK33083, into any engine.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs to this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(h) Related Information

(1) You may find additional information on calculating Standard Duty Cycles and or using HEAVY Profile Cycles, in RR TLM 05–00–01–800–801, Recording and Control of the Lives of Parts.

(2) For more information about this AD, contact Alan Strom, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *phone:* (781) 238–7143; *fax:* (781) 238–7199; *email:alan.strom@faa.gov.*

(3) Refer to European Aviation Safety Agency Airworthiness Directive 2007–0003R1, dated January 15, 2009, and RR Alert Service Bulletin No. RB.211–72–AE935, Revision 7, dated January 19, 2009, for related information.

Issued in Burlington, Massachusetts, on October 31, 2011.

Peter A. White,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2011–28678 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1171; Directorate Identifier 2011–NM–101–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 737–100, –200, –200C, and –300 series airplanes. This proposed AD was prompted by a report from the airplane manufacturer that airplanes were assembled with air distribution ducts in the environmental control system (ECS) wrapped with Boeing Material Specification (BMS) 8–39 or Aeronautical Materials Specifications (AMS) 3570 polyurethane foam insulation, a material with fire-retardant properties that deteriorate with age. This proposed AD would require reworking certain air distribution ducts in the ECS. We are proposing this AD to prevent ignition of the BMS 8–39 or AMS 3570 polyurethane foam insulation on the duct assemblies of the ECS due to a potential electrical arc, which could start a small fire and lead to a larger fire that may spread throughout the airplane through the ECS.

DATES: We must receive comments on this proposed AD by December 22, 2011.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; *telephone* (206) 544–5000, extension 1; *fax* (206) 766–5680; *email me.boecom@boeing.com; Internet https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kimberly A. DeVoe, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; *phone:* (425) 917–6495; *fax:* (425) 917–6590; *email: Kimberly.Devoe@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1171; Directorate Identifier 2011–NM–101–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We have received reports of duct assemblies in the ECS with burned BMS 8–39 polyurethane foam insulation on two Model 767–200 series airplanes. The airplane manufacturer has also notified us that certain Model 737–100, –200, –200C, and –300 series airplanes were assembled with duct assemblies in the ECS wrapped with BMS 8–39 or AMS 3570 polyurethane foam insulation. The fire-retardant properties of BMS 8–39 and AMS 3570 polyurethane foam insulation deteriorate with age. This, along with dust, dirt, and other carbon particulate contamination of the insulation on the ducts, adds an available fuel source for a potential fire. Once ignited, the foam insulation emits noxious smoke, does not self-extinguish, and drips droplets of liquefied polyurethane, which can further propagate a fire. Because the insulation is wrapped around the duct assemblies, which are located throughout the airplane, if the insulation is ignited a fire could potentially travel along the ducts and spread throughout the airplane. This condition, if not corrected, could result in ignition of the BMS 8–39 or AMS 3570 polyurethane foam insulation on the duct assemblies of the ECS due to a potential electrical arc, which could start a small fire and lead to a larger fire that may spread throughout the airplane through the ECS.

Other Relevant Rulemaking

On January 14, 2008, we issued AD 2008–02–16, Amendment 39–15346 (73 FR 4061, January 24, 2008), applicable to certain Model 767–200 and 767–300 series airplanes.

On June 17, 2010, we issued AD 2010–14–01, Amendment 39–16344 (75 FR 38007, July 1, 2010), applicable to certain Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400F, 747SR, and 747SP series airplanes.

AD 2008–02–16, Amendment 39–15346 (73 FR 4061, January 24, 2008), and AD 2010–14–01, Amendment 39–16344 (75 FR 38007, July 1, 2010), require reworking certain duct assemblies in the ECS. These ADs resulted from reports of duct assemblies in the ECS with burned BMS 8–39 polyurethane foam insulation. These ADs also resulted from reports from the airplane manufacturer that airplanes were assembled with duct assemblies in the ECS wrapped with BMS 8–39 polyurethane foam insulation, a material with fire-retardant properties that deteriorate with age. We issued these ADs to prevent a potential electrical arc from igniting the BMS 8–39 polyurethane foam insulation on the duct assemblies of the ECS, which could propagate a small fire and lead to a larger fire that might spread throughout the airplane through the ECS.

Relevant Service Information

We reviewed Boeing Service Bulletin 737–21A1132, Revision 3, dated February 16, 2011. This service bulletin describes procedures for reworking and part-marking the following affected duct assemblies ECS systems. The rework includes doing a pressure and leak test following installation of the new insulation.

- Captain's outlet air distribution ducts
- Control cabin air distribution ducts
- Distribution manifold
- Passenger air distribution gasper air ducts

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and the Service Information.''

Differences Between the Proposed AD and the Service Information

Boeing Service Bulletin 737–21A1132, Revision 3, dated February 16, 2011, recommends reworking the affected duct assemblies ''during the next heavy maintenance check, within 24,000 flight-hours from the date on this service bulletin.'' This proposed AD would require operators to rework the affected duct assemblies within 72 months after the effective date of the AD. In developing the compliance time for this action, we considered the degree of urgency associated with addressing the subject unsafe condition. We also considered the availability of required parts and the practical aspect of reworking the affected duct assemblies within an interval that parallels normal scheduled maintenance for most affected operators. The average heavy maintenance schedule for the affected fleet is between 60 and 72 months; therefore, the proposed compliance time of 72 months is equivalent to the recommended compliance time of ''during the next heavy maintenance check, within 24,000 flight-hours,'' and it represents an appropriate interval in which an ample number of required parts will be available to modify the affected fleet without adversely affecting the safety of these airplanes. This difference has been coordinated with the Boeing Company.

Costs of Compliance

We estimate that this proposed AD affects 292 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Duct assembly rework/part marking	250 work-hours × $85 per hour = $21,250.	$3,545	$24,795	$7,240,140

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

The Boeing Company: Docket No. FAA–2011–1171; Directorate Identifier 2011–NM–101–AD.

(a) Comments Due Date

We must receive comments by December 22, 2011.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737–100, –200, –200C, and –300 series airplanes, certificated in any category; as identified in Boeing Service Bulletin 737–21A1132, Revision 3, dated February 16, 2011.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 21, Air conditioning.

(e) Unsafe Condition

This AD was prompted by a report from the airplane manufacturer that airplanes were assembled with air distribution ducts in the environmental control system (ECS) wrapped with Boeing Material Specification (BMS) 8–39 or Aeronautical Materials Specifications (AMS) 3570 polyurethane foam insulation, a material with fire retardant properties that

deteriorate with age. We are issuing this AD to prevent ignition of the BMS 8–39 or AMS 3570 polyurethane foam insulation on the duct assemblies of the ECS due to a potential electrical arc, which could start a small fire and lead to a larger fire that may spread throughout the airplane through the ECS.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Air Distribution Duct Rework

Within 72 months after the effective date of this AD, rework the applicable duct assemblies in the ECS specified in and in accordance with the Accomplishment Instructions and Appendix A of Boeing Service Bulletin 737–21A1132, Revision 3, dated February 16, 2011.

Note 1: The service bulletin accomplishment instructions might refer to other procedures. When the words ''refer to'' are used and the operator has an accepted alternative procedure, the accepted alternative procedure can be used to comply with the AD. When the words ''in accordance with'' are included in the instruction, the procedure in the design approval holder document must be used to comply with the AD.

(h) Credit for Actions Accomplished in Accordance With Previous Service Information

Reworking the applicable duct assemblies in the ECS in accordance with the Accomplishment Instructions and Appendix A of Boeing Service Bulletin 737–21A1132, Revision 2, dated June 13, 2007, before the effective date of this AD is acceptable for compliance with the corresponding actions required by paragraph (g) of this AD.

(i) Parts Installation

As of the effective date of this AD, no person may install an ECS duct assembly with BMS 8–39 or AMS 3570 polyurethane foam insulation on any airplane.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM&-Seattle-ACO-Requests-faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(k) Related Information

(1) For more information about this AD, contact Kimberly A. DeVoe, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; *phone:* (425) 917–6495; *fax:* (425) 917–6590; *email: Kimberly.Devoe@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; *phone:* (206) 544–5000, extension 1; *fax:* (206) 766–5680; *email: me.boecom@boeing.com*; Internet: *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Issued in Renton, Washington, on October 26, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–28758 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1169; Directorate Identifier 2010–NM–050–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Services B.V. Model F.28 Mark 0100 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

[T]here have been a number of occurrences with Messier-Dowty MLG [main landing gear] units where the main fitting failed, due to fatigue cracking in the area of the filler and bleeder holes, and occurrences where the sliding member failed, due to fatigue cracking at the area of chrome run-out/lower radius of the sliding tube portion of the sliding member.

Investigation has revealed that the most probable cause of * * * cracks is high compressive stress during braking at higher deceleration levels outside the regular fatigue load spectrum. [T]he high compressive stress locally exceeds the elasticity limit of the material, leaving a residual tensile stress at release of the heavy braking load. Subsequently, this local residual tensile stress results in a negative effect on the fatigue life of the component.

This condition, if not detected and corrected, could lead to failure of the MLG, possibly resulting in loss of control of the aeroplane during the landing rollout. * * *

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by December 22, 2011.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For Fokker service information identified in this proposed AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands; *telephone:* +31 (0)252–627–350; *fax:* +31 (0)252–627–211; *email: technicalservices.fokkerservices@stork.com*; *Internet: http://www.myfokkerfleet.com.*

For Messier-Dowty service information identified in this proposed AD, contact Messier Services Americas, Customer Support Center, 45360 Severn Way, Sterling, Virginia 20166–8910; *telephone:* (703) 450–8233; *fax:* (703) 404–1621; *Internet: https://techpubs.services.messier-dowty.com.*

You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the

regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; *telephone:* (425) 227–1137; *fax:* (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1169; Directorate Identifier 2010–NM–050–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2009–0269R1, dated March 11, 2010 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Since introduction of the F28 Mark 0100 aeroplane into airline service, there have been a number of occurrences with Messier-Dowty MLG [main landing gear] units where the main fitting failed, due to fatigue cracking in the area of the filler and bleeder holes, and occurrences where the sliding member failed, due to fatigue cracking at the area of chrome run-out/lower radius of the sliding tube portion of the sliding member.
>
> Investigation has revealed that the most probable cause of both the main fitting and sliding member cracks is high compressive stress during braking at higher deceleration levels outside the regular fatigue load spectrum. Starting at deceleration stress levels somewhat below limit load, the high compressive stress locally exceeds the elasticity limit of the material, leaving a residual tensile stress at release of the heavy braking load. Subsequently, this local residual tensile stress results in a negative effect on the fatigue life of the component.
>
> This condition, if not detected and corrected, could lead to failure of the MLG, possibly resulting in loss of control of the aeroplane during the landing rollout. To address this unsafe condition, the Civil Aviation Authority of the Netherlands (CAA–NL) issued AD NL–2005–012 (EASA approval 2005–6363) [which corresponds to FAA 2007–04–23, Amendment 39–14956 (72 FR 8615, February 27, 2007)] to require repetitive inspections of the sliding member (Fokker Services SBF100–32–144) and AD NL–2006–003 (EASA approval 2006–0041) to require repetitive inspections of the main fitting (Fokker Services SBF100–32–146). Messier-Dowty has now developed a modification, resulting in a strengthened sliding member and a strengthened main fitting, which is the terminating action for these repetitive inspections.
>
> For the reasons described above, this [EASA] AD requires the modification and reidentification of the affected MLG units, or replacement of the affected MLG units with modified units.
>
> This [EASA] AD has been revised to * * * state that modification of an aeroplane * * * also constitutes terminating action for the actions required by CAA–NL AD (BLA) 2002–115/2 dated October 8, 2004 [which partially corresponds to FAA AD 2008–20–03, Amendment 39–15682 (73 FR 56452, September 29, 2008)].

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Fokker Services B.V. has issued:

- Fokker Service Bulletin SBF100–32–155, dated July 23, 2009;
- Fokker Service Bulletin SBF100–32–097, dated September 30, 1995;
- Fokker Service Bulletin SBF100–32–132, dated December 5, 2001; and
- Fokker Service Bulletin SBF100–32–156, Revision 1, dated June 29, 2009.

Messier-Dowty has issued Service Bulletin F100–32–112, dated July 17, 2009. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 4 products of U.S. registry. We also estimate that it would take about 30 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $520,000 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $2,090,200, or $522,550 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Fokker Services B.V.: Docket No. FAA–2011–1169; Directorate Identifier 2010–NM–050–AD.

Comments Due Date

(a) We must receive comments by December 22, 2011.

Affected ADs

(b) This AD affects: AD 98–06–26, Amendment 39–10404 (63 FR 13502, March 20, 1998); AD 98–13–32, Amendment 39–10623 (63 FR 34581, June 25, 1998); AD 2004–14–01, Amendment 39–13710 (69 FR 41391, July 9, 2004); AD 2007–04–23, Amendment 39–14956 (72 FR 8615, February 27, 2007); AD 2008–20–03, Amendment 39–15682 (73 FR 56452, September 29, 2008); and AD 2010–21–12, Amendment 39–16472 (75 FR 63042, October 14, 2010).

Applicability

(c) This AD applies to Fokker Services B.V. Model F.28 Mark 0100 airplanes, certificated in any category, all serial numbers, equipped with Messier-Dowty (formerly Dowty-Rotol, Dowty Aerospace Gloucester) main landing gear (MLG).

Subject

(d) Air Transport Association (ATA) of America Code 32: Landing Gear.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

[T]here have been a number of occurrences with Messier-Dowty MLG [main landing gear] units where the main fitting failed, due to fatigue cracking in the area of the filler and bleeder holes, and occurrences where the sliding member failed, due to fatigue cracking at the area of chrome run-out/lower radius of the sliding tube portion of the sliding member.

Investigation has revealed that the most probable cause of * * * cracks is high compressive stress during braking at higher deceleration levels outside the regular fatigue load spectrum. [T]he high compressive stress locally exceeds the elasticity limit of the material, leaving a residual tensile stress at release of the heavy braking load. Subsequently, this local residual tensile stress results in a negative effect on the fatigue life of the component.

This condition, if not detected and corrected, could lead to failure of the MLG, possibly resulting in loss of control of the aeroplane during the landing rollout. * * * * * * * * *

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Actions

(g) Within 48 months after the effective date of this AD, do an inspection of the MLG to determine whether Messier-Dowty (formerly Dowty-Rotol, Dowty Aerospace Gloucester) main landing gear (MLG) units having Part Number (P/N) 201072011, 201072012, 201072013, 201072014, 201072015, or 201072016 are installed on the airplane. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number of the MLG unit can be conclusively determined from that review. If any of those part numbers is found, do the requirements of paragraph (h) of this AD.

(h) If, during the inspection required by paragraph (g) of this AD, any Messier-Dowty (formerly Dowty-Rotol, Dowty Aerospace Gloucester) main landing gear (MLG) units having Part Number (P/N) 201072011, 201072012, 201072013, 201072014, 201072015, or 201072016 are found, within 48 months after the effective date of this AD, do the actions specified in paragraph (h)(1) or (h)(2) of this AD.

(1) Replace each MLG unit having P/N 201072011, 201072012, 201072013, 201072014, 201072015, or 201072016, with a MLG unit having P/N 201072017, P/N 201072019, or P/N 201072021 (for LH), as applicable; or P/N 201072018, P/N 201072020 or P/N 201072022 (for RH), as applicable; in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–32–155, dated July 23, 2009, and do the actions required in paragraph (j) of this AD.

(2) Modify and re-identify each affected MLG unit identified in paragraph (c) of this AD, in accordance with the Accomplishment Instructions of Messier-Dowty Service Bulletin F100–32–112, dated July 17, 2009, and do the actions required in paragraph (j) of this AD.

Parts Installation

(i) As of the effective date of this AD, no person may install on any airplane a MLG unit having P/N 201072011, P/N 201072012, P/N 201072013, P/N 201072014, P/N 201072015, or P/N 201072016.

Removing Placard and Airplane Flight Manual Amendment

(j) Before further flight after accomplishing the actions required by paragraph (h) of this AD, remove the airplane flight manual amendment and placard that were installed as required by AD 2008–20–03, Amendment 39–15682 (73 FR 56452, September 29, 2008).

Prior or Concurrent Actions

(k) Prior to or concurrently with the action (replacement or modification) as required by paragraph (h) of this AD, accomplish the following actions:

(1) Install the torque link spacer with changed outer diameter, in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–32–097, dated September 30, 1995.

(2) Remove, if installed, the water spray deflectors, in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–32–132, dated December 5, 2001.

(3) Replace all P/N AE70690E, P/N AE70691E, P/N AE99111E, and P/N AE99119E brake quick-disconnect couplings with improved units in accordance with Part 2 of the Accomplishment Instructions of Fokker Service Bulletin SBF100–32–156, Revision 1, dated June 29, 2009. Accomplishing the actions required by this paragraph terminates the requirements of AD 2010–21–12, Amendment 39–16472 (75 FR 63042, October 14, 2010) for that airplane only.

ADs Affected by Accomplishment of Paragraph (h) of This AD

(l) Accomplishing the actions required by paragraph (h) of this AD terminates the requirements of the following ADs for that airplane only: AD 98–06–26, Amendment 39–10404 (63 FR 13502, March 20, 1998); AD 98–13–32, Amendment 39–10623 (63 FR 34581, June 25, 1998); AD 2007–04–23, Amendment 39–14956 (72 FR 8615, February 27, 2007); and AD 2008–20–03, Amendment 39–15682 (73 FR 56452, September 29, 2008).

Other AD Affected by Accomplishment of Paragraph (h) of This AD

(m) Accomplishing the actions required by paragraph (h) of this AD terminates the requirements of AD 2004–14–01, Amendment 39–13710 (69 FR 41391, July 9, 2004), for that airplane only.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(n) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; *telephone:* (425) 227–1137; *fax:* (425) 227–1149. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

Related Information

(o) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2009–0269R1, dated March 11, 2010; Fokker Service Bulletins SBF100–32–155, dated July 23, 2009, SBF100–32–097, dated September 30, 1995, SBF100–32–132, dated December 5, 2001, and SBF100–32–156, Revision 1, dated June 29, 2009; and Messier-Dowty Service Bulletin F100–32–112, dated July 17, 2009; for related information.

Issued in Renton, Washington, on October 26, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–28756 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1170; Directorate Identifier 2010–NM–264–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Airbus Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model C4–605R Variant F airplanes (collectively called A300–600 series airplanes), and Model A310 series airplanes that would supersede an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

One operator experienced failures of four Fuel Level Sensor-Amplifier (FLSA) and Multi Tank Indicators (MTI) units. FLSA and MTI failures have been identified as having been caused by incorrect connector sleeves materials fitted to the MTI units.

Degradation of the electrical insulation sleeves of the Low-level indication lamps on the MTI of the flight deck can cause a short circuit that might result in high voltage being conveyed to the high and low level sensors in the wing tanks. This condition, if not corrected, could cause the level sensor to heat above acceptable limits, possibly resulting in fuel tank explosion, and consequent loss of the aeroplane.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by December 22, 2011.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For Airbus service information identified in this proposed AD, contact Airbus SAS–EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email: *account.airworth-eas@airbus.com*; Internet *http://www.airbus.com*. For GE Aviation service information identified in this proposed AD, contact GE Aviation, Customer Support Center, 1 Neumann Way, Cincinnati, Ohio 45215; telephone (513) 552–3272; email *cs.techpubs@ge.com*; Internet *http://www.geaviation.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1170; Directorate Identifier 2010–NM–264–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On December 28, 2008, we issued AD 2009–02–04, Amendment 39–15794 (74 FR 7792, February 20, 2009). That AD required actions intended to address an unsafe condition on all Airbus Model A300–600 airplanes.

Since we issued AD 2009–02–04, Amendment 39–15794 (74 FR 7792, February 20, 2009), Airbus has issued new service information to correct interference between sensors and a fuel pipe at the connector level. We have determined that the following actions are necessary:

- Replacing the cockpit MTI,
- Replacing the high-level, low-level, and overflow sensors and their harness connectors with fused sensors and new harness connectors,
- Reinstating the low-level warning indication to the cockpit MTI, and
- Adding Model A310 series airplanes to the applicability of this proposed AD. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0175, dated August 18, 2010 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> One operator experienced failures of four Fuel Level Sensor-Amplifier (FLSA) and Multi Tank Indicators (MTI) units. FLSA and MTI failures have been identified as having been caused by incorrect connector sleeves materials fitted to the MTI units.
>
> Degradation of the electrical insulation sleeves of the Low-level indication lamps on the MTI of the flight deck can cause a short circuit that might result in high voltage being conveyed to the high and low level sensors in the wing tanks. This condition, if not corrected, could cause the level sensor to heat above acceptable limits, possibly resulting in fuel tank explosion, and consequent loss of the aeroplane.
>
> As an interim action, EASA AD 2008–0055 [which corresponds to FAA AD 2009–02–04, Amendment 39–15794 (74 FR 7792, February 20, 2009)], was issued requiring the accomplishment of wiring modifications to protect the FLSA and the Flight Warning Computers from 115V [volt] AC [alternating current] and 28V DC [direct current] short circuits within the cockpit MTI.
>
> EASA AD 2009–0144, which required the replacement of the affected sensors and their harness connectors with modified units in accordance with the instructions of Airbus Service Bulletin (SB) A300–28–6095 at original issue or SB A300–28–9013 at original issue, as applicable, was further on cancelled because the installation of the new inner tank fused low-level sensors was not possible, due to interference between some sensors and a fuel pipe at connector level.
>
> Airbus SB A300–28–6095 and SB A300–28–9013 have been revised to clear this interference. The replacement of the affected sensors and their harness connectors according to the instructions of these SBs is now possible.
>
> This [EASA] AD supersedes [EASA] AD 2008–0055 and introduces the following actions:
>
> —Expanding of the applicability to A310 aeroplanes; and
> —Replacement of the cockpit MTI with a MTI with silicone sleeves and to reinstate the low level warning indication to the cockpit MTI; and
> —Replacement of the affected sensors and their harness connectors by fused level sensor units for A300–600 and A300–600ST aeroplanes.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

The following service information has been issued. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

- Airbus Mandatory Service Bulletin A300–28–6095, Revision 01, dated February 2, 2010.
- Airbus Mandatory Service Bulletin A300–28–6101, dated June 4, 2008.
- Airbus Mandatory Service Bulletin A300–28–6103, Revision 01, dated May 18, 2010.
- Airbus Mandatory Service Bulletin A310–28–2167, dated June 4, 2008.
- GE Aviation Service Bulletin 1404KID–28–466, Revision 1, dated July 15, 2008.
- GE Aviation Service Bulletin 1406KID–28–467, Revision 1, dated July 15, 2008.
- GE Aviation Service Bulletin 1410KID–28–468, Revision 1, dated July 15, 2008.
- GE Aviation Service Bulletin 1420KID–28–469, Revision 1, dated July 23, 2008.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 210 products of U.S. registry.

The actions that are required by AD 2009–02–04, Amendment 39–15794 (74 FR 7792, February 20, 2009) and retained in this proposed AD take about 5 work-hours per product, at an average labor rate of $85 per work hour. Required parts cost about $0 per product. Based on these figures, the estimated cost of the currently required actions is $425 per product.

We estimate that it would take about 44 work-hours per product to comply with the new basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $207 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $828,870, or $3,947 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that

section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–15794 (74 FR 7792, February 20, 2009) and adding the following new AD:

Airbus: Docket No. FAA–2011–1170; Directorate Identifier 2010–NM–264–AD.

Comments Due Date

(a) We must receive comments by December 22, 2011.

Affected ADs

(b) This AD supersedes AD 2009–02–04, Amendment 39–15794 (74 FR 7792, February 20, 2009).

Applicability

(c) This AD applies to Airbus Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, F4–605R, F4–622R, and C4–605R Variant F airplanes, and Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes; certificated in any category; all certified models, all manufacturer serial numbers.

Subject

(d) Air Transport Association (ATA) of America Code 28: Fuel.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

One operator experienced failures of four Fuel Level Sensor-Amplifier (FLSA) and Multi Tank Indicators (MTI) units. FLSA and MTI failures have been identified as having been caused by incorrect connector sleeves materials fitted to the MTI units.

Degradation of the electrical insulation sleeves of the Low-level indication lamps on the MTI of the flight deck can cause a short circuit that might result in high voltage being conveyed to the high and low level sensors in the wing tanks. This condition, if not corrected, could cause the level sensor to heat above acceptable limits, possibly resulting in fuel tank explosion, and consequent loss of the aeroplane.

* * * * *

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Restatement of Requirements of AD 2009–02–04, Amendment 39–15794 (74 FR 7792, February 20, 2009), With No New Service Information

Actions and Compliance

(g) For Model A300–600 airplanes: Unless already done, within 3 months after March 27, 2009 (the effective date of AD 2009–02–04, Amendment 39–15794 (74 FR 7792, February 20, 2009)): Modify the wiring in the right-hand electronics rack in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28A6096, Revision 02, dated July 4, 2008. Previous accomplishment of the modification before March 27, 2009, in accordance with Airbus Mandatory Service Bulletin A300–28A6096, dated October 19, 2007; or Revision 01, dated April 16, 2008; meets the requirements in this paragraph. Doing the required actions in paragraph (h) or (i) of this AD, as applicable, terminates the actions required by this paragraph.

New Requirements of This AD, With New Service Information

Replacement and Re-Instatement

(h) For Model A300–600 series airplanes on which Airbus modification 06213 has been embodied in production: Within 24 months after the effective date of this AD, do the actions required by paragraphs (h)(1), (h)(2), and (h)(3) of this AD. Doing the actions in this paragraph terminates the requirements of paragraph (g) of this AD.

(1) Replace the cockpit MTI, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6101, dated June 4, 2008.

(2) Before further flight after doing the replacement specified in paragraph (h)(1) of this AD: Replace the high-level, low-level, and overflow sensors and their harness connectors, with fused sensors and new harness connectors, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6095, Revision 01, dated February 2, 2010.

(3) Before further flight after doing the replacement specified in paragraph (h)(2) of this AD: Re-instate the low-level warning indication to the cockpit MTI, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6103, Revision 01, dated May 18, 2010.

(i) For Model A300–600 series airplanes on which Airbus modification 06213 has not been embodied in production: Within 24 months after the effective date of this AD, do the actions required by paragraphs (i)(1), (i)(2), and (i)(3) of this AD. Doing the actions in this paragraph terminates the requirements of paragraph (g) of this AD.

(1) Replace the cockpit MTI, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6101, dated June 4, 2008.

(2) Before further flight after doing the replacement specified in paragraph (i)(1) of this AD: Re-instate the low-level warning indication to the cockpit MTI, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6103, Revision 01, dated May 18, 2010.

(3) Before further flight after doing the action specified in paragraph (i)(2) of this AD: Replace the high-level, low-level, and overflow sensors and their harness connectors, with fused sensors and new harness connectors, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6095, Revision 01, dated February 2, 2010.

(j) For Model A310 series airplanes: Within 24 months after the effective date of this AD, replace the cockpit MTI, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A310–28–2167, dated June 4, 2008.

Credit for Actions Accomplished in Accordance With Previous Service Information

(k) Re-instating the low-level warning indication to the cockpit MTI in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6103, dated May 20, 2009, before the effective date of this AD, is acceptable for compliance with the corresponding re-instatement required by paragraphs (h)(3) and (i)(2) of this AD.

Parts Installation

(l) As of the effective date of this AD, no person may install, on any airplane, any MTI

in the cockpit location, unless it has been modified in accordance with the applicable service information listed in paragraphs (l)(1), (l)(2), (l)(3), (l)(4), (l)(5), and (l)(6) of this AD.

(1) Airbus Mandatory Service Bulletin A300–28–6101, dated June 4, 2008.

(2) Airbus Mandatory Service Bulletin A310–28–2167, dated June 4, 2008.

(3) GE Aviation Service Bulletin 1404KID–28–466, Revision 1, dated July 15, 2008.

(4) GE Aviation Service Bulletin 1406KID–28–467, Revision 1, dated July 15, 2008.

(5) GE Aviation Service Bulletin 1410KID–28–468, Revision 1, dated July 15, 2008.

(6) GE Aviation Service Bulletin 1420KID–28–469, Revision 1, dated July 23, 2008.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(m) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

Related Information

(n) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2010–0175, dated August 18, 2010; Airbus Mandatory Service Bulletin A300–28–6095, Revision 01, dated February 2, 2010; Airbus Mandatory Service Bulletin A300–28–6101, dated June 4, 2008; Airbus Mandatory Service Bulletin A300–28–6103, Revision 01, dated May 18, 2010; Airbus Mandatory Service Bulletin A310–28–2167, dated June 4, 2008; GE Aviation Service Bulletin 1404KID–28–466, Revision 1, dated July 15, 2008; GE Aviation Service Bulletin 1406KID–28–467, Revision 1, dated July 15, 2008; GE Aviation Service Bulletin 1410KID–28–468, Revision 1, dated July 15, 2008; and GE Aviation Service Bulletin 1420KID–28–469, Revision 1, dated July 23, 2008; for related information.

Issued in Renton, Washington, on October 26, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–28754 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–1014; Airspace Docket No. 11–AAL–19]

RIN 2120–AA66

Proposed Amendment of VOR Federal Airways V–320 and V–440; Alaska

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend two VHF Omnidirectional Range (VOR) Federal airways in Alaska, V–320 and V–440, due to the relocation of the Anchorage VOR navigation aid. This action is necessary for the continued safe and efficient management of Instrument Flight Rules (IFR) operations within the National Airspace System.

DATES: Comments must be received on or before December 22, 2011.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; *telephone:* (202) 366–9826. You must identify FAA Docket No. FAA–2011–1014 and Airspace Docket No. 11–AAL–19 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace, Regulation and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; *telephone:* (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2011–1014 and Airspace Docket No. 11–AAL–19) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2011–1014 and Airspace Docket No. 11–AAL–19.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Western Service Center, Operations Support Group, Federal Aviation Administration, 1601 Lind Avenue SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRMs should

contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

History

Docket No. FAA–2011–0010, Airspace Docket No. 11–AAL–1 published on April 28, 2011 (76 FR 23687), that amends all Alaska Federal Airways affected by the relocation of the Anchorage VOR navigation aid, subsequently had the effective date delayed until further notice (76 FR 35097; June 16, 2011). The FAA then determined that V–320 and V–440 did not have satisfactory signal reception coverage in the vicinity of Anchorage, AK, and removed them from the rule, to be amended in a future rulemaking (76 FR 65106; October 20, 2011). This action would amend the above airways as the signal reception of the relocated navigation aid is satisfactory to meet Minimum Enroute Altitude (MEA) requirements.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to amend Alaska Federal airways V–320 and V–440. The airway descriptions would reflect the Anchorage VOR relocation from Fire Island, AK, to Ted Stevens Anchorage International Airport, Anchorage, AK. Additionally, the proposed descriptions incorporate new navigation aid radials to describe airway intersections necessary to retain a 10,000 feet MEA currently used by air traffic control for instrument flight rules aircraft in the vicinity of Anchorage, AK.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Federal airways in Alaska.

Alaskan VOR Federal Airways are published in paragraph 6010(b) of FAA Order 7400.9V, dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. The domestic VOR Federal Airways listed in this document will be published subsequently in the Order.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, and effective September 15, 2011, is amended as follows:

Paragraph 6010—VOR Federal airways.

b—Alaskan VOR Federal airways

* * * * *

V–320 [Amended]

From McGrath, AK; INT McGrath 121°(T)/102°(M) and Kenai, AK 350°(T)/331°(M) radials; INT Kenai 350°(T)/331°(M) and Anchorage, AK 291°(T)/272°(M) radials; Anchorage; INT Anchorage 147°(T)/128°(M) and Johnstone Point, AK, 271°(T)/244°(M) radials; to Johnstone Point.

* * * * *

V–440 [Amended]

From Nome, AK; Unalakleet, AK; McGrath, AK; Anchorage, AK; INT Anchorage 147°(T)/128°(M) and Middleton Island, AK 309°(T)/288°(M) radials; Middleton Island; Yakutat, AK; Biorka Island, AK; to Sandspit, BC. The airspace within Canada is excluded.

Issued in Washington, DC, on October 24, 2011.

Gary A. Norek,

Acting Manager, Airspace, Regulation and ATC Procedure Group.

[FR Doc. 2011–28614 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 738, 740, 742, 770, 772 and 774

[Docket No. 110824536–1499–01]

RIN 0694–AF36

Revisions to the Export Administration Regulations (EAR): Control of Aircraft and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML)

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Proposed rule.

SUMMARY: This proposed rule describes how articles the President determines no longer warrant control under Category VIII (aircraft and related items) of the United States Munitions List (USML) would be controlled under the Commerce Control List (CCL) in new Export Control Classification Numbers (ECCNs) 9A610, 9B610, 9C610, 9D610, and 9E610. In addition, this proposed rule would control military aircraft and related items now controlled under ECCNs 9A018, 9D018 and 9E018 under new ECCNs 9A610, 9D610 and 9E610. This proposed rule also addresses license exception availability for items controlled by the five new ECCNs that would be created.

This is the second in a planned series of proposed rules describing how various types of articles the President determines, as part of the Administration's Export Control Reform Initiative, no longer warrant USML control, would be controlled on the CCL and by the EAR. This proposed rule is being published in conjunction with a

proposed rule of the Department of State, Directorate of Defense Trade Controls, which would amend the list of articles controlled by USML Category VIII.

In addition, this proposed rule would modify aspects of the Bureau of Industry Security's (BIS) July 15, 2011 proposed rule by adding cross references to ECCNs 9A018, 9D018 and 9E018; by adding provisions relating to License Exception Strategic Trade Authorization (STA) eligibility to clarify that its scope extends to the United States Government, to any person in the United States, and to the ''development'' or ''production'' of items; and by including a general policy of denial for 600 series items for destinations that are subject to a United States arms embargo under the regional stability reasons for control.

DATES: Comments must be received by December 22, 2011.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* The identification number for this rulemaking is BIS–2011–0033.
- By email directly to *publiccomments@bis.doc.gov.* Include RIN 0694–AF36 in the subject line.
- By mail or delivery to Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2099B, 14th Street and Pennsylvania Avenue NW., Washington, DC 20230. Refer to RIN 0694–AF36.

FOR FURTHER INFORMATION CONTACT: Gene Christiansen, Office of National Security and Information Technology Controls, tel. (202) 482–2984, email *gene.christiansen@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

On July 15, 2011, as part of the Administration's ongoing Export Control Reform Initiative, BIS published a proposed rule (76 FR 41958) (''the July 15 proposed rule'') that set forth a framework for how articles the President determines, in accordance with section 38(f) of the Arms Export Control Act (AECA) (22 U.S.C. 2778(f)), would no longer warrant control on the United States Munitions List (USML) instead would be controlled on the Commerce Control List (CCL). With that proposed rule, BIS also described its proposal for how military vehicles and related articles in USML Category VII that no longer warrant control under the USML would be controlled on the CCL.

Following the structure of the July 15 proposed rule, this proposed rule describes BIS's proposal for how a second group of items—various military aircraft and related articles that are controlled by USML Category VIII—would be controlled on the CCL. The proposed changes described in this proposed rule and the State Department's proposed amendment to Category VIII of the USML are based on a review of Category VIII by the Defense Department, which worked with the Departments of State and Commerce in preparing the proposed amendments. The review was focused on identifying the types of articles that are now controlled by USML Category VIII that are either (i) Inherently military and otherwise warrant control on the USML or (ii) if it is a type common to civil aircraft applications, possess parameters or characteristics that provide a critical military or intelligence advantage to the United States, and that are almost exclusively available from the United States. If an article satisfied one or both of those criteria, the article remained on the USML. If an article did not satisfy either standard but was nonetheless a type of article that is, as a result of differences in form and fit, ''specially designed'' for military applications, then it was identified in the new ECCNs proposed in this notice. The licensing policies and other EAR-specific controls for such items also described in this notice would enhance national security by (i) Allowing for greater interoperability with our NATO and other allies while still maintaining and expanding robust controls and, in some cases, prohibitions on exports or reexports to other countries and for proscribed end users and end uses; (ii) enhancing our defense industrial base by, for example, reducing the current incentives for foreign companies to design out or avoid U.S.-origin ITAR-controlled content, particularly with respect to generic, unspecified parts and components; and (iii) permitting the U.S. Government to focus its resources on controlling, monitoring, investigating, analyzing, and, if need be, prohibiting exports and reexports of more significant items to destinations, end uses, and end users of greater concern than our NATO allies and other multi-regime partners.

Pursuant to section 38(f) of the AECA, the President shall review the USML ''to determine what items, if any, no longer warrant export controls under'' the AECA. The President must report the results of the review to Congress and wait 30 days before removing any such items from the USML. The report must ''describe the nature of any controls to be imposed on that item under any other provision of law.'' 22 U.S.C. 2778(f)(1). This proposed rule describes how certain military aircraft and related articles in USML Category VIII would be controlled by the EAR and its CCL if the President determines that the articles no longer warrant control on the USML.

In the July 15 proposed rule, BIS proposed creating a series of new ECCNs to control items that would be moved from the USML to the CCL, or that are items from the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies Munitions List (Wassenaar Arrangement Munitions List or WAML) that are already controlled elsewhere on the CCL. The proposed rule referred to this series as the ''600 series'' because the third character in each of the new ECCNs would be a ''6.'' The first two characters of the 600 series ECCNs serve the same function as any other ECCN as described in § 738.2 of the EAR. The first character is a digit in the range 0 through 9 that identifies the Category on the CCL in which the ECCN is located. The second character is a letter in the range A through E that identifies the product group within a CCL Category. In the 600 series, the third character is the number 6. With few exceptions, the final two characters identify the WAML category that covers items that are the same or similar to items in a particular 600 series ECCN.

BIS will publish additional **Federal Register** notices containing proposed amendments to the CCL that will describe proposed controls for additional categories of articles the President determines no longer warrant control under the USML. The State Department will publish concurrently proposed amendments to the USML that correspond to the BIS notices. BIS will also publish proposed rules to further align the CCL with the WAML and the Missile Technology Control Regime Equipment, Software and Technology Annex.

Modifications to Provisions in the July 15 Proposed Rule

In addition to the proposals mentioned above, this proposed rule would make the following modifications to the July 15 proposed rule.

- Additions to proposed paragraph (a)(13) in § 740.2;
- Changes to the proposed Note to paragraph (c)(1) in § 740.20;
- Changes to ECCNs 9A018, 9D018 and 9E018;
- Addition of new Category 9 600 series ECCNs to § 742.6(a)(1); and
- Changes in eligible users for 600 Series under License Exception STA in § 740.2(a)(13).

A complete discussion of these modifications is described in the section ''Scope of this Proposed Rule.'' BIS will consider comments on the original proposals only for the specific paragraph, note, and ECCNs referenced above, and only in the context of the proposed rule's modifications to them.

Scope of This Proposed Rule

This proposed rule would create five new 600 series ECCNs in CCL Category 9—9A610, 9B610, 9C610, 9D610, and 9E610—that would control articles the President determines no longer warrant control under USML Category VIII. Consistent with the regulatory construct identified in the July 15 proposed rule, this rule also would move items currently classified under ECCNs 9A018, 9D018, and 9E018 to the new ECCNs. As part of the proposed changes, these three 018 ECCNs would cross-reference the new classifications in the 600 series. As noted in the July 15 proposed rule, moving items from 018 ECCNs to the appropriate 600 series ECCNs would consolidate WAML and formerly USML items into one series of ECCNs.

The rule would also create a new Supplement No. 4 to part 740 that would prohibit the use of License Exceptions STA or GOV to export or reexport, except to U.S. government agencies or personnel, ECCN 9D610 software and ECCN 9E610 technology (other than ''build-to-print technology'') for the production of specific types of parts and components classified under ECCN 9A610.x.

License Exception STA under § 740.20(c)(1) generally would be available for eligible end items (as described in § 740.20(g) of the July 15 proposed rule) and all other 600 series items if, at the time of export, reexport or transfer (in-country) the item is destined (i) For ultimate end use by the armed forces, police, paramilitary, law enforcement, customs, correctional, fire, and search and rescue agencies of a government in one of the § 740.20(c)(1) countries (the ''STA–36'') or of the United States Government; or (ii) for the ''production'' or ''development'' of an item for ultimate end use by any of those foreign government agencies in any of the thirty-six § 740.20(c)(1) countries, by the United States Government, or by any person in the United States. This condition means that exports and reexports to non-governmental end users in one of the STA–36 countries under STA would be permissible so long as the item at issue would ultimately be provided to, or for the production or development of an item to be provided to and for end use by, any of the foregoing agencies of a government of a STA–36 country, the United States Government, or any person in the United States. This eligibility under License Exception STA is proposed because the U.S. Government recognizes that there would be a significant volume of desirable trade between and among private companies in the STA–36 countries regarding ''600 series'' end items that would ultimately be for use by one of the foregoing government agencies of an STA–36 country, the United States Government, and manufacturers in the United States. This proposal protects U.S. export control interests while at the same time facilitating permissible exports, reexports, and transfers (in-country) with the governments of the STA–36 countries and the United States. BIS particularly welcomes comments on the types of government agencies that would be eligible to ultimately receive items through this license exception. If, for example, there are types of agencies or persons that have been omitted from this list but that commenters believe should be included, commenters should provide BIS with this information, including specific examples of such agencies or persons.

The proposed changes are discussed in more detail below.

New Category 9 600 Series ECCNs

Certain military aircraft and related articles the President determines no longer warrant control in USML Category VIII would be controlled under proposed new ECCNs 9A610, 9B610, 9C610, 9D610, and 9E610. These new ECCNs follow the 600 series construct identified in the July 15 proposed rule.

Paragraphs .a through .k of ECCN 9A610 would consist of ''end items,'' as that term was defined in the July 15 proposed rule, and some types of related parts, components, accessories, attachments, equipment, and systems. Paragraphs .b, .c, .d, and .e would be reserved to make paragraphs .f through .i align with paragraphs on the WAML covering similar items. Paragraphs .l, .m, and .n would control Unmanned Aerial Vehicle (UAV)-related items that are not identified on the USML or the WAML, but which are identified on the Missile Technology Control Regime (MTCR) Equipment, Software and Technology Annex and which are proposed to be subject to the MT Column 1 reason for control. Paragraphs .o through .w would be reserved for possible future use. Paragraph .x would consist of parts, components, accessories and attachments (including certain unfinished products that have reached a stage in manufacturing where they are clearly identifiable as commodities controlled by paragraph .x) that are ''specially designed'' for a commodity in paragraphs .a through .k or a defense article in USML Category VIII. Paragraph .y would consist of 25 specific types of commodities that, if specially designed for a commodity subject to control in this 9A610 or a defense article in USML Category VIII, warrant less strict controls because they have little or no military significance. Commodities listed in paragraph .y would be controlled for antiterrorism (AT Column 1) reasons, which imposes a license requirement for five countries and, in accordance with the July 15 proposed rule, if destined for a military end use to the People's Republic of China, as described in § 744.21.

This proposed rule does not add aircraft gas turbine engines to the proposed new ECCN 9A610. Instead, the Administration plans to issue a proposed rule later that would describe the U.S. Government's controls on gas turbine engines and related items for military aircraft, ships, and vehicles, which is currently anticipated to be new ECCN 9A619. Although this numbering deviates slightly from the WAML numbering approach, BIS believes that it would be more efficient to list all 600 series controls for gas turbine engines and related items in one ECCN. The anticipated new ECCN will correspond to a new USML Category XIX that the State Department would propose creating to control USML-controlled gas turbine engines and related articles. When BIS publishes the proposed rule to address gas turbine engines and related items for military aircraft, missiles, ships, and vehicles, cross references to the proposed new ECCN would be added to the new ECCNs proposed by this rule.

ECCN 9B610.a would consist of test, inspection, and production equipment specially designed for the development or production of aircraft and related commodities and articles controlled by ECCN 9A610 or USML Category VIII. ECCN 9B610.b would consist of environmental test facilities designed or modified for military aircraft and related commodities. These new ECCN paragraphs would also implement WAML Category 18, which applies to production equipment and components for items on the WAML generally, with respect to production equipment for military aircraft, and environmental test facilities for such aircraft and related commodities. ECCN 9B610.c would implement a Missile Technology Control Regime control on production facilities specially designed for certain

types of Unmanned Aerial Vehicles or drones.

ECCN 9C610 would consist of materials specially designed for aircraft and related commodities controlled by ECCN 9A610 that are not specified elsewhere on the CCL, such as in CCL Category 1, or on the USML. USML subcategory XIII(f) would continue to control structural materials ''specifically designed, developed, configured, modified, or adapted for defense articles,'' such as aircraft controlled by USML subcategory VIII(a). The State Department plans to publish a proposed revision to XIII(f) that would make it a more positive list of the structural materials that are controlled by USML XIII(f). When that occurs, BIS will publish a corresponding proposed revision to ECCN 9C610 so that it controls such items specially designed for ECCN 9A610 items and USML Category VIII items that are not positively listed in any revised USML XIII(f).

ECCN 9D610 would consist of software specially designed for commodities in 9A610, 9B610, or 9C610. ECCN 9D610 would also contain a ''Note to License Exceptions Section'' referring readers to the proposed Supplement No. 4 to part 740, which would limit the use of License Exceptions GOV and STA for ECCN 9D610 software for the production or development of 15 types of parts and components.

ECCN 9E610 would consist of technology that is required commodities in 9A610, 9B610, 9C610, or software 9D610. ECCN 9E610 would also contain a ''Note to License Exceptions Section'' referring to proposed Supplement No. 4 to part 740, discussed below, which would limit the use of License Exceptions GOV and STA for ECCN 9E610 technology (other than ''build-to-print technology'') for the production of 15 types of ECCN 9A610.x parts and components.

ECCNs 9A610, 9B610, 9C610, 9D610, and 9E610 would each have a special paragraph designated ''.y.99'' to cover items that would otherwise fall within the scope of one of the ECCNs because, for example, they were ''specially designed'' for a military use, but which (i) Had been previously determined by the Department of State to be subject to the EAR and (ii) were not listed on the CCL. Items in these .y.99 paragraphs would be subject to antiterrorism controls.

Items currently classified under ECCN 9A018 paragraphs .a, .c, .d, .e and .f would be moved to ECCN 9A610. In conjunction with the establishment of the new ECCN 9X610 entries and consistent with the July 15 proposed rule's statement that 018 entries would remain in the CCL for a time, but only for cross-reference purposes, this rule would amend ECCNs 9A018, 9D018, and 9E018 to be solely cross references to the new 600 series ECCNs that cover the items currently in those 018 ECCNs. ECCN 9A018 would refer to ECCN 9A610 for aircraft related commodities (*i.e.,* for items currently classified under ECCN 9A018 paragraphs .a, .c, .d, .e, and .f). Similarly, for all items other than those applying to ground vehicles, ECCN 9D018 would refer to ECCN 9D610 for software, and ECCN 9E018 would refer to ECCN 9E610 for technology.

This proposed rule would remove § 770.2(i) ''Interpretation 9 Civil aircraft and Civil aircraft equipment (including parts, accessories, attachments, components and related training equipment).'' That section explains the licensing authorities of the Departments of State and Commerce with respect to aircraft and related items. It would no longer be needed given the text of proposed ECCN 9A610.

In the July 15 proposed rule, BIS proposed moving items classified under ECCN 9A018.b (certain ground vehicles) to newly proposed ECCN 0A606.b.4. With that rule, BIS identified a corresponding proposed amendment to ECCN 9A018 that cross-referenced ECCN 0A606.b.4 for former ECCN 9A018.b items. This rule proposes to further amend ECCN 9A018, maintaining the proposed reference to ECCN 0A606.b.4 for items currently classified under ECCN 9A018.b and cross-referencing ECCN 9A610 for all other items currently classified under ECCN 9A018 (*i.e.,* items classified under ECCN 9A018.a, .c, .d, .e and .f).

The July 15 proposed rule indicated that software and technology applying to ground vehicle-related commodities, currently classified under ECCNs 9D018 and 9E018, would be classified under newly proposed ECCNs 0D606 and 0E606. However, the July 15 proposed rule did not propose cross-referencing language to be included in ECCNs 9D018 and 9E018. As noted above, BIS is now proposing amendments to ECCNs 9D018 and 9E018 to cross-reference ECCNs 9D610 and 9E610, for software and technology applying to those classified under ECCN 9A018 paragraphs .a, .c, .d, .e and .f. In conjunction with this proposal, BIS is also proposing amendments to ECCNs 9D018 and 9E018 that reference ECCNs 0D606 and 0E606 for software and technology applying to those items classified under ECCN 9A018.b.

License Exception Restrictions

Certain software and technology related to parts and components covered by .x items paragraphs of 600 series ECCNs warrant more restrictive license exception applicability than other software and technology currently on the CCL. This rule proposes creating a new Supplement No. 4 to Part 740 (600 Series Items Subject to Limits Regarding License Exceptions GOV and STA) that would identify 600 series items that may not be exported, reexported, or transferred (in-country) pursuant to License Exceptions STA (§ 740.20 of the EAR) or GOV (§ 740.11 of the EAR). The supplement would be structured to list by CCL category the items for which license exception applicability is limited.

New Supplement No. 4 to part 740 would list 15 types of parts and components that would be classified under new ECCN 9A610.x and would state that License Exception STA (§ 740.20 of the EAR) may not be used to export, reexport, or transfer (in-country) any software classified under ECCN 9D610 or technology classified under ECCN 9E610—other than ''build-to-print technology''—for the production or development of any types of the listed ECCN 9A610.x parts and components. Further, the supplement would state that License Exception GOV, other than the paragraphs that authorize shipments to U.S. government agencies for official use or U.S. government personnel for personal use or official use (§ 740.11(b)(2)(i) and (ii) of the EAR), is not available for the export or reexport of software and technology (other than ''build-to-print technology'') for the production or development of the ECCN 9A610.x parts and components listed in the supplement.

A new note to § 740.20(c)(1) would be added, and § 740.2(a)(13) would be clarified regarding the License Exception STA eligibility of end items and all other 600 series items. In the July 15 proposed rule, the export of a 600 series item is eligible for License Exception STA if, at the time of export, reexport or transfer (in-country), the item is destined for ultimate end use by the armed forces, police, paramilitary, law enforcement, customs and border protection, correctional, fire, and search and rescue agencies of a government in one of the STA–36 countries. This proposed rule would make 600 series items eligible for License Exception STA for such uses and also when exported, reexported, or transferred for the production or development of an item for ultimate end use by a STA–36

country government agency, by the United States Government, or by a person in the United States. In addition this proposed rule would replace the phrase ''customs and border protection'' with the phrase ''customs'' because BIS believes that the latter more accurately describes the practice of most governments. This clarification would make no change to the STA restrictions in § 740.20(b)(2), including the restriction that prohibits use of STA for missile technology (MT) controlled items.

Other Changes

A new definition for ''build-to-print technology'' would be added to § 772.1. This definition is needed to add precision to that term as used in new Supplement No. 4 to part 740.

This rule proposes amending License Exception GOV (§ 740.11) by adding references to the new proposed Supplement No. 4 to Part 740 supplement's prohibitions in paragraphs (a)(5), (b)(2)(iii)(A), (b)(2)(iv)(A), and (c)(2)(iv), as well as in a note to (d)(1). Similarly, this rule proposes to amend License Exception STA (§ 740.20) by adding a reference to the proposed prohibitions in paragraph (b)(3).

Corresponding Amendments

As discussed in further detail below, the July 15 proposed rule stated that one reason for control for items classified in the 600 series is Regional Stability Column 1. Items classified under proposed ECCN 9A610, other than ECCN 9A610.y items, as well as related technology and software classified under ECCNs 9D610 and 9E610, would be controlled for this reason, among others. Correspondingly, this proposed rule would revise § 742.6 of the EAR to apply the RS Column 1 licensing policy to commodities classified under ECCN 9A610, 9B610, 9C610 (except paragraphs .y of those ECCNs), and to related software and technology classified under ECCNs 9D610 and 9E610. This proposed rule would also amend the RS Column 1 licensing policy to impose a general policy of denial for ''600 series'' items if the destination is subject to a United States arms embargo and a general policy of denial for items specially designed or required for F–14 aircraft.

Relationship to the July 15 Proposed Rule

As referenced above, the purpose of the July 15 proposed rule was to set up the framework for creating ECCNs that would cover articles that the President determines no longer warrant coverage on the USML, but for which export control under the EAR is appropriate. To facilitate that goal, the July 15 proposed rule contained definitions and concepts that were meant to be applied across Categories. However, as BIS undertakes rulemakings to move specific categories of items from the USML to the CCL, there may be unforeseen issues or complications that may require BIS to reexamine those definitions and concepts. The comment period for the July 15 proposed rule closed on September 13, 2011.

To the extent that this rule's proposals affect any provision in July 15 proposed rule or the July 15 proposed rule's provisions affect this proposed rule, BIS will consider comments on those provisions so long as they are in the context of the changes proposed in this rule. For example, BIS will consider comments on how the movement of Category VIII items from the USML to the CCL affects a definition, restriction, or provision that was contained in the July 15 proposed rule. BIS will also consider comments on the impact of a definition of a term in the July 15 proposed rule when that term is used in this proposed rule. BIS will not consider comments of a general nature regarding the July 15 proposed rule that are submitted in response to this rulemaking.

BIS believes that the following aspects of the July 15 proposed rule are among those that could affect this proposed rule:

- *De minimis* provisions in § 734.4;
- Definitions of terms in § 772.1;
- Restrictions on use of license exceptions in §§ 740.2, 740.10, 740.11, and 740.20;
- Change to national security licensing policy in § 742.4;
- Requirement to request authorization to use License Exception STA for end items in 600 series ECCNs and procedures for submitting such requests in §§ 740.2, 740.20, 748.8 and Supp. No. 2 to part 748;
- Licensing policy in § 742.4(b)(1)(ii); and
- Addition of 600 series items to Supplement No. 2 to Part 744—List of Items Subject to the Military End-Use Requirement of § 744.21.

BIS believes that the following aspects of this proposed rule are among those that could affect the provisions of the July 15 proposed rule:

Addition of U.S. arms embargo policy regarding 600 series items set forth in § 742.4(b)(1)(ii) (national security) of the July 15 proposed rule to § 742.6(b)(1) (regional stability) of this proposed rule;

- Addition of denial policy regarding 600 series items for F–14 aircraft set forth in § 742.6(b)(1) of this proposed rule.

Positive, Tiered, and Aligned Control Lists

In December 2010, the Departments of Commerce and State published Advanced Notices of Proposed Rulemaking that described the Administration's plan to make the USML and the CCL positive, tiered, and aligned so that they eventually can be combined into a single control list (*See* ''Commerce Control List: Revising Descriptions of Items and Foreign Availability,'' 75 FR 76664 (Dec. 9, 2010) and ''Revision to the United States Munitions List,'' 75 FR 76935 (Dec. 10, 2010)). This remains one of the Administration's ultimate Export Control Reform objectives. In order to reach more quickly the national security objectives described above, the Administration has decided, as an interim step, to propose revisions to both the USML and the CCL to make them more objective, but to delay its plan to tier the export control regime until a later date. The most significant aspect of the more positive proposed USML categories is that they would not contain controls on all generic ''parts,'' ''components,'' ''accessories,'' and ''attachments'' that were in any way ''specifically designed or modified'' for a defense article, regardless of their significance to maintaining a military advantage for the United States. Rather, they would contain a positive list of specific types of parts, components, accessories, and attachments that continue to warrant control on the USML. All other parts, components, accessories, and attachments ''specially designed'' for a defense article would become subject to the new 600 series controls on the CCL as described in the July 15 proposed rule. The Administration will also propose revisions to the jurisdictional status of certain militarily less significant end items that do not warrant USML control, but the primary impact would be with respect to current USML controls on parts, components, accessories, and attachments that no longer warrant USML control.

Based, in part, on a review of the comments received in response to the December 2010 notices, the Administration also has determined that fundamentally altering the structure of the USML by tiering and aligning it on a category-by-category basis would significantly disrupt the export control compliance systems and procedures of exporters and reexporters. For example, until the entire USML is revised and becomes final, some USML categories

would follow the legacy numbering and control structures while the newly revised categories would follow a completely different numbering structure. The only way to alleviate this impact would be to delay implementation until all categories are complete or to proceed with building positive lists now and returning to structural changes once complete. In order to allow for the national security benefits to flow from re-aligning the jurisdictional status of defense articles that no longer warrant control on the USML on a category-by-category basis while minimizing the impact on exporters' internal control and jurisdictional and classification marking systems, the Administration plans to proceed on a category-by-category basis with the approach described in this proposed rule.

Finally, in order to prevent any aircraft-related commodity specially designed for a military use that is not described in the proposed revisions to the USML from inadvertently dropping out of the U.S. Government's export controls, the rule proposes to use the catch-all phrase ''specially designed,'' as defined in the July 15 proposed rule, in the new ECCNs to control commodities not otherwise identified on the revised USML or elsewhere in the ECCN. The primary examples of this approach are ECCN 9A610.a, which controls any aircraft ''specially designed'' for a military use not identified on the USML or elsewhere on the CCL, and ECCN 9A610.x, which controls any part, component, accessory, or attachment ''specially designed'' for a military aircraft and not otherwise identified on the USML or elsewhere in the CCL. This approach is also part of a core objective of the Export Control Reform Initiative, which is to create a bright jurisdictional line between the USML and the CCL. As evidenced by the proposed revisions to USML Category VIII published by the State Department concurrently with this proposed rule, the Administration is following through on its commitment that the USML not contain generic, catch-all controls on every ''part,'' ''component,'' ''accessory,'' or ''attachment'' that is in any way specifically designed, modified, adapted, or configured, regardless of its military significance, for a defense article. The proposed USML revision is a substantially more positive list than the current list. Thus, to the extent an item is ''specially designed'' for a military use, it is subject to a 600 series ECCN in the EAR unless specifically identified on the ITAR's USML.

Effects of This Proposed Rule

BIS believes that the principal effect of this rule will be to provide greater flexibility for exports and reexports to NATO member countries and other multiple-regime-member countries of items the President determines no longer warrant control on the United States Munitions List. This greater flexibility will be in the form of: application of the EAR's *de minimis* threshold principle for items constituting less than a *de minimis* amount of controlled U.S.-origin content in foreign made items; availability of license exceptions, particularly License Exceptions RPL and STA; elimination of the requirements for manufacturing agreements and technical assistance agreements in connection with exports of technology; and a reduction in or elimination of exporter and manufacturer registration requirements and associated registration fees. Some of these specific effects are discussed in more detail below.

De Minimis

Section 734.3 of the EAR provides, *inter alia,* that under certain conditions items made outside the United States that incorporate items subject to the EAR are not subject to the EAR if they do not exceed a ''*de minimis*'' percentage of controlled U.S. origin content. Depending on the destination, the *de minimis* percentage can be either 10 percent or 25 percent. If the July 15 proposed rule's amendments at § 734.4 of the EAR are adopted, the new ECCNs 9A610, 9B610, 9C610, 9D610 and 9E610 proposed in this rule would be subject to the *de minimis* provisions set forth in the July 15 proposed rule because they would be ''600 series'' ECCNs. Foreign-made items incorporating items in the new ECCNs would become eligible for *de minimis* treatment at the 10 percent level. The AECA does not permit the ITAR to have a *de minimis* treatment for these USML-listed items, regardless of the significance or insignificance of the item. Foreign-made items incorporating *any* items that currently are classified under ECCN 9A018 would be subject to the EAR if those foreign made items contain more than 10 percent U.S. origin controlled content, regardless of the destination and regardless of the proportion of the U.S. origin controlled content accounted for by the former ECCN 9A018 items.

Use of License Exceptions

The July 15 proposed rule would impose certain limits for 600 series items moving from existing 018 controls on the CCL. BIS believes that even with the July 15 proposed restrictions on the use of license exceptions and the additional restrictions identified in this proposed rule, restrictions on items currently on the USML would be reduced, particularly with respect to exports to NATO members and multiple-regime member countries, if those items were moved from the USML to proposed ECCN 9A610. BIS also believes that, in practice, the movement of items from ECCN 9A018 to ECCN 9A610 would have little effect on license exception availability for those items because existing restrictions or the terms of the license exceptions themselves already preclude most transactions that would be precluded by the July 15 proposed amendments to § 740.2 of the EAR. However, BIS is aware of two situations (the use of License Exceptions GOV and STA) in which movement of items in ECCN 9A018 to ECCN 9A610 could, in practice, impose greater limits on use of license exceptions than currently is the case.

First, the July 15 proposed rule would limit use of License Exception GOV for 600 series commodities to situations in which the United States Government is the consignee and end user or to situations in which the consignee or end user is the government of a country listed in § 740.20(c)(1). Currently, commodities classified under ECCN 9A018 may be exported under any provision of License Exception GOV to any destination authorized by that provision if all of the conditions of that provision are met and nothing else in the EAR precludes such shipment.

Second, the July 15 proposed rule would limit use of License Exception STA for ''end items'' in 600 series ECCNs to those end items for which a specific request for License Exception STA eligibility, filed in conjunction with a license application, has been approved and would require that the end item be for ultimate end use by a foreign government agency of a type specified in the July 15 proposed rule. The July 15 proposed rule also would limit exports of 600 series parts, components, accessories, and attachments under License Exception STA for ultimate end use by the same set of end users. Neither restriction currently applies to use of License Exception STA for commodities classified under ECCN 9A018. In addition, the July 15 proposed rule would limit shipment of 600 series items under License Exception STA to destinations listed in § 740.20(c)(1). Currently, commodities classified under ECCN 9A018.c, .d, .e, and .f (which would be moved to ECCN 9A610 under

this proposed rule) and related software and technology (currently classified under ECCNs 9D018 and 9E018, and proposed to move to new ECCNs 9D610 and 9E610) may be shipped under License Exception STA to destinations listed in § 740.20(c)(1) or (c)(2).

Making U.S. Export Controls More Consistent With the Wassenaar Arrangement Munitions List

The Administration has stated since the beginning of the Export Control Reform Initiative that the reforms will be consistent with the obligations of the United States to the multilateral export control regimes. Accordingly, the Administration will, in this and subsequent proposed rules, exercise its national discretion to implement, clarify, and, to the extent feasible, align its controls with those of the regimes. For example, the proposed ECCN 9A610 tracks, to the extent possible, the numbering structure and text of WAML category 10 pertaining to military aircraft not subject to the ITAR. It also implements in 9A610.x the controls in WAML category 16 for forgings, castings, and other unfinished products; in 9B610.a and .b the controls in WAML category 18 for production equipment; in 9D610 the applicable controls in WAML category 21 for software; and in 9E610 the applicable controls in WAML category 22 for technology.

Clarifying the Relationship Between U.S. Export Controls and the Missile Technology Control Regime (MTCR) Equipment, Software and Technology Annex

This proposed rule would identify the specific paragraphs in proposed ECCNs 9A610, 9B610, 9D610, and 9E610 that list items that are also on the MTCR Equipment, Software and Technology Annex and apply the MT Column 1 reason for control to those paragraphs. This action would impose the missile technology based license requirements and licensing policy of § 742.5 of the EAR to those items. Those items are currently subject to the ITAR, which does not specify the multilateral regime on which a license requirement is based. Listing these items on the CCL with the reason for control stated will correlate the underlying MTCR control with export license requirements and licensing policy.

Other Effects

Pursuant to the framework identified in the July 15 proposed rule, commodities classified under ECCN 9A610 (other than ECCN 9A610.l, .m, .n, and. y), along with related test, inspection and production equipment, materials, software and technology classified under ECCNs 9B610, 9C610, 9D610 and 9E610 (other than ECCNs 9B610.c. and 9X610.y) would be subject to the licensing policies set forth in § 742.4(b)(1) (national security, column 1). Commodities classified under ECCN 9A610.l, .m and .n, along with related test, inspection and production equipment, software and technology classified under ECCNs 9B610.c, 9D610 and 9E610 would be subject to the licensing policy set forth in § 742.5(b) (missile technology) because they are listed on the Missile Technology Control Regime Equipment, Software and Technology Annex. They would not be subject to national security controls because they are not identified on the WAML. All commodities in ECCN 9A610 (other than 9A610.y which is subject to an antiterrorism reason for control only and the prohibitions in Part 744) along with related test, inspection and production equipment, materials, software and technology classified under ECCNs 9B610, 9C610, 9D610 and 9E610 (other than 9X610.y) would be subject to the licensing policies set forth in § 742.6(a)(1) (regional stability, column 1).

The July 15 proposed rule would change § 742.4 to set forth a general policy of denial for 600 series items for destinations that are subject to a United States arms embargo, which would apply to all items controlled for national security reasons under this proposed rule. This proposed rule adds that general policy of denial to § 742.6(b)(1) (regional stability column 1). This addition is needed so that the general denial policy for 600 series items would apply to items in proposed ECCNs 9A610, 9B610, 9D610 and 9E610 that are subject to the missile technology and regional stability reasons for control but not to the national security reason for control. This rule also adds a general policy of denial to § 742.6(b)(1) for items specially designed or required for F–14 aircraft because Iran is the only country that has such aircraft in its active inventory.

Jurisdictional and Classification Status of Items Subject to Previous Commodity Jurisdiction Determinations

The Administration recognizes that some items that would fall within the scope of the proposed new ECCNs will have been subject to commodity jurisdiction (CJ) determinations issued by the United States Department of State. The State Department will have either determined that the item was subject to the jurisdiction of the ITAR or that it was not. (See 22 CFR 120.3 and 120.4). Under this proposed rule, items the State Department determined to be not subject to the ITAR and that are now not described on the CCL would be subject to the AT-only controls of the ''.y99'' paragraph of the applicable ECCN if they would otherwise be within the scope of the ECCN. Thus, for example, ECCN 9A610.x would control any part, component, accessory, or attachment not specifically identified in the USML or elsewhere in the ECCN if it was ''specially designed'' for a military aircraft. If a particular part, component, accessory, or attachment was, as defined, ''specially designed'' for a military aircraft and was at the time of a CJ determination not identified on the CCL, it would be controlled under 9A610.y.99. If it was identified or, as a matter of law or the result of a subsequent commodity classification (''CCATS'') determination by Commerce, controlled by another legacy ECCN, such as 9A991.d, 7A994, or 9A003, that ECCN would continue to apply to the item. This general approach will, pending public comment, be repeated in subsequent proposed rules pertaining to other categories of items.

If, however, the State Department had made a CJ determination that a particular item was subject to the jurisdiction of ITAR but that item is not described on the final, implemented version of a revised USML category, a new CJ determination would not be required unless there was doubt about the application of the new USML category to the item. (See 22 CFR 120.4). Thus, unless there were doubts about the jurisdictional status of a particular item, exporters and reexporters would be entitled to rely on the revised USML categories when making jurisdictional determinations, notwithstanding past CJ determinations that, under the previous version of the USML, the item was ITAR controlled.

Finally, if the State Department had made a CJ determination that a particular item was subject to the jurisdiction of the ITAR and that item remains in the revised USML, the item would remain subject to the jurisdiction of the ITAR.

Section-by-Section Description of the Proposed Changes

- Section 738.2(d)(2)(ii)—Adds a reference to STA paragraphs in some 600 series ECCNs that clarify STA eligibility regarding those ECCNs.
- Section 740.2—Republishes proposed new paragraph (a)(13) from the July 15 proposed rule with changes to make License Exception STA eligible for exports, reexports, and in-country transfers of items that would be used in the production of items for governments

of countries listed in 740.20(c)(1), or for the United States Government or any person in the United States.

• Section 740.11—Amends License Exception GOV to add references to Supplement No. 4 to part 740 and partially restates the prohibition on using provisions of License Exception GOV to export or reexport certain technology and software listed in that supplement, other than exports and reexports to personnel and agencies of the U.S. Government.

• Section 740.20—Amends License Exception STA to refer to Supp. No. 4 to part 740 and partially restate the prohibition on using license exception STA to export, reexport or transfer (in-country) certain technology and software listed in that supplement. Republishing a ''Note to paragraph (c)(1)'' from the July 15 proposed rule with additional text to make License Exception STA eligible for exports, reexports and in-country transfers of items that would be for or used for the production or development of items for governments of countries listed in 740.20(c)(1), or for the United States Government or any person in the United States.

• Supplement No. 4 to part 740—Prohibits using License Exception STA or provisions of License Exception GOV other than those authorizing exports and reexports to personnel and agencies of the U.S. Government to export, reexport or transfer software and technology (other than ''build-to-print technology'') for the development or production of specified ECCN 9A610.x items.

• Section 742.6—ECCNs 9A610, 9B610, 9C610, 9D610 and 9E610 are added to § 742.6(a)(1) to impose a RS Column 1 license requirement and licensing policy. Section 742.6(b)(1) would be amended to apply a general denial policy for applications to export or reexport ''600 series'' to destinations that are subject to a United States arms embargo and to export items specially designed for or required for F–14 aircraft to any destination.

• Section 770.2—Removes paragraph (i)—Interpretation 9: Civil aircraft and civil aircraft equipment.

• Section 772.1—Adds a definition of ''build-to-print technology.''

• Supplement No. 1 to part 774—Adds ECCNs 9A610, 9B610, 9C610, 9D610 and 9E610. Replaces existing text of ECCNs 9A018, 9D018 and 9E018 with cross-references to ECCNs 0A606, 0D606 and 0E606 for items related to ground vehicles that have been moved to those ECCNs and with references to new ECCNs 9A610, 9D610 and 9E610 for all other items (*i.e.,* items related to aircraft) that have been moved to those ECCNs.

Request for Comments

BIS seeks comments on this proposed rule. BIS will consider all comments received on or before December 22, 2011. All comments (including any personally identifying information or information for which a claim of confidentially is asserted either in those comments or their transmittal emails) will be made available for public inspection and copying. Parties who wish to comment anonymously may do so by submitting their comments via Regulations.gov, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself.

Regulatory Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

2. Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB control number. This proposed rule would affect two approved collections: Simplified Network Application Processing + System (control number 0694–0088), which includes, among other things, license applications, and License Exceptions and Exclusions (0694–0137).

As stated in the proposed rule published at 76 FR 41958 (July 15, 2011), BIS believes that the combined effect of all rules to be published adding items to EAR that would be removed from the ITAR as part of the administration's Export Control Reform Initiative would increase the number of license applications to be submitted by approximately 16,000 annually resulting in an increase in burden hours of 5,067 (16,000 transactions at 17 minutes each) under control number 0694–0088.

Some items formerly on the USML would become eligible for License Exception STA under this rule. Other such items may become eligible for License Exception STA upon approval of a request submitted in conjunction with a license application. As stated in the July 15 proposed rule, BIS believes that the increased use of License Exception STA resulting from the combined effect of all rules to be published adding items to EAR that would be removed from the ITAR as part of the administration's Export Control Reform Initiative would increase the burden associated with control number 0694–0137 by about 23,858 hours (20,450 transactions @ 1 hour and 10 minutes each).

BIS expects that this increase in burden would be more than offset by a reduction in burden hours associated with approved collections related to the ITAR. This proposed rule addresses controls on military aircraft and related parts, components, production equipment, materials, software, and technology. The largest impact of the proposed rule would be with respect to exporters of parts and components because, under the proposed rule, most U.S. and foreign military aircraft currently in service would continue to be subject to the ITAR. Because, with few exceptions, the ITAR allows exemptions from license requirements only for exports to Canada, most exports to integrators for U.S government equipment and most exports of routine maintenance parts and components for our NATO and other close allies require State Department authorization. In addition, the exports necessary to produce parts and components for defense articles in the inventories of the United States and its NATO and other close allies require State Department authorizations. Under the EAR, as proposed, a small number of low level parts would not require a license to most destinations. Most other parts, components, accessories, and attachments would become eligible for export to NATO and other close allies under License Exception STA. Use of License Exception STA imposes a paperwork and compliance burden because, for example, exporters must furnish information about the item being exported to the consignee and obtain from the consignee an acknowledgement and commitment to comply with the EAR. It is, however, the Administration's understanding that complying with the requirements of STA is likely to be less burdensome

than applying for licenses. For example, under License Exception STA, a single consignee statement can apply to an unlimited number of products, need not have an expiration date and need not be submitted to the government in advance for approval. Suppliers with regular customers can tailor a single statement and assurance to match their business relationship rather than applying repeatedly for licenses with every purchase order to supply allied and, in some cases, U.S forces with routine replacement parts and components.

Even in situations in which a license would be required under the EAR, the burden is likely to be reduced compared to the license requirement of the ITAR. In particular, license applications for exports of technology controlled by ECCN 9E610 are likely to be less complex and burdensome than the authorizations required to export ITAR-controlled technology, *i.e.,* Manufacturing License Agreements and Technical Assistance Agreements.

3. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

4. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.,* generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Chief Counsel for Regulations, Department of Commerce, certified to the Chief Counsel for Advocacy, Small Business Administration that this proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities for the reasons explained below. Consequently, BIS has not prepared a regulatory flexibility analysis. A summary of the factual basis for the certification is provided below.

Number of Small Entities

The Bureau of Industry and Security (BIS) does not collect data on the size of entities that apply for and are issued export licenses. Although BIS is unable to estimate the exact number of small entities that would be affected by this rule, it acknowledges that this rule would affect some unknown number.

Economic Impact

This proposed rule is part of the Administration's Export Control Reform Initiative. Under that initiative, the United States Munitions List (22 CFR part 121) (USML) would be revised to be a ''positive'' list, *i.e.,* a list that does not use generic, catch-all controls on any part, component, accessory, attachment, or end item that was in any way specifically modified for a defense article, regardless of the article's military or intelligence significance or non-military applications. At the same time, articles that are determined to no longer warrant control on the USML would become controlled on the Commerce Control List (CCL). Such items, along with certain military items that currently are on the CCL, will be identified in specific Export Control Classification Numbers (ECCNs) known as the ''600 series'' ECCNs. In addition, some items currently on the Commerce Control List would move from existing ECCNs to the new 600 series ECCNs. In practice, the greatest impact of this rule on small entities would likely be reduced administrative costs and reduced delay for exports of items that are now on the USML but would become subject to the EAR. This rule focuses on Category VIII articles, which are aircraft and related parts, components, production equipment, software, and technology. Most operational military aircraft currently in active inventory would remain on the USML. However, parts and components, which are more likely to be produced by small businesses than are complete military aircraft, would in many cases become subject to the EAR. In addition, officials of the Department of State have informed BIS that license applications for such parts and components are a high percentage of the license applications for USML articles review by that department.

Changing the jurisdictional status of Category VIII items would reduce the burden on small entities (and other entities as well) through:

—Elimination of some license requirements,
—Greater availability of license exceptions,
—Simpler license application procedures, and
—Reduced (or eliminated) registration fees.

In addition, parts and components controlled under the ITAR remain under ITAR control when incorporated into foreign-made items, regardless of the significance or insignificance of the item, discouraging foreign buyers from incorporating such U.S. content. The availability of *de minimis* treatment under the EAR may reduce the incentive for foreign manufacturers to avoid purchasing U.S.-origin parts and components

Twenty-five types of parts and components, identified in ECCN 9A610.y, would be designated immediately as parts and components that, even if specially designed for a military use, have little or no military significance. These parts and components, which under the ITAR require a license to nearly all destinations, would, under the EAR, require a license to only five destinations and, if destined for a military end use, the People's Republic of China.

Many exports and reexports of the Category VIII articles that would be placed on the CCL by this rule, particularly parts and components, would become eligible for license exceptions that apply to shipments to United States Government agencies, shipments valued at less than $1,500, parts and components being exported for use as replacement parts, temporary exports, and License Exception Strategic Trade Authorization (STA), reducing the number of licenses that exporters of these items would need. License Exceptions under the EAR would allow suppliers to send routine replacement parts and low level parts to NATO and other close allies and export control regime partners for use by those governments and for use by contractors building equipment for those governments or for the United States government without having to obtain export licenses. Under License Exception STA, the exporter would need to furnish information about the item being exported to the consignee and obtain a statement from the consignee that, among other things, would commit the consignee to comply with the EAR and other applicable U.S. laws. Because such statements and obligations can apply to an unlimited number of transactions and have no expiration date, they would impose a net reduction in burden on transactions that the government routinely approves through the license application process that the License Exception STA statements would replace.

Even for exports and reexports in which a license would be required, the process would be simpler and less costly under the EAR. When a USML Category VIII article is moved to the CCL, the number of destinations for which a license is required would

remain unchanged. However, the burden on the license applicant would decrease because the licensing procedure for CCL items is simpler and more flexible that the license procedure for UMSL articles.

Under the USML licensing procedure, an applicant must include a purchase order or contract with its application. There is no such requirement under the CCL licensing procedure. This difference gives the CCL applicant at least two advantages. First, the applicant has a way of determining whether the U.S. government will authorize the transaction before it enters into potentially lengthy, complex and expensive sales presentations or contract negotiations. Under the USML procedure, the applicant will need to caveat all sales presentations with a reference to the need for government approval and is more likely to have to engage in substantial effort and expense only to find that the government will reject the application. Second, a CCL license applicant need not limit its application to the quantity or value of one purchase order or contract. It may apply for a license to cover all of its expected exports or reexports to a particular consignee over the life of a license (normally two years, but may be longer if circumstances warrant a longer period), reducing the total number of licenses for which the applicant must apply.

In addition, many applicants exporting or reexporting items that this rule would transfer from the USML to the CCL would realize cost savings through the elimination of some or all registration fees currently assessed under the USML's licensing procedure. Currently, USML applicants must pay to use the USML licensing procedure even if they never actually are authorized to export. Registration fees for manufacturers and exporters of articles on the USML start at $2,500 per year, increase to $2,750 for organizations applying for one to ten licenses per year and further increases to $2,750 plus $250 per license application (subject to a maximum of three percent of total application value) for those who need to apply for more than ten licenses per year. There are no registration or application processing fees for applications to export items listed on the CCL. Once the Category VIII items that are the subject to this rulemaking are moved from the USML to the CCL, entities currently applying for licenses from the Department of State would find their registration fees reduced if the number of USML licenses those entities need declines. If an entity's entire product line is moved to the CCL, then its ITAR registration and registration fee requirement would be eliminated.

De minimis treatment under the EAR would become available for all items that this rule would transfer from the USML to the CCL. Items subject to the ITAR remain subject to the ITAR when they are incorporated abroad into a foreign-made product regardless of the percentage of U.S content in that foreign made product. Foreign-made products that incorporate items that this rule would move to the CCL would be subject to the EAR only if their total controlled U.S.-origin content exceeded 10 percent. Because including small amounts of U.S.-origin content would not subject foreign-made products to the EAR, foreign manufacturers would have less incentive to avoid such U.S.-origin parts and components, a development that potentially would mean greater sales for U.S. suppliers, including small entities.

For items currently on the CCL that would be moved from existing ECCNs to the new 600 series, license exception availability would be narrowed somewhat and the applicable *de minimis* threshold for foreign-made products containing those items would in some cases be reduced from 25 percent to 10 percent. BIS is still considering comments made in response to the July 15 rule pertaining to these proposed new *de minimis* levels and as noted above, will consider *de minimis* related comments to this proposed rule provided they are in the context of this proposed rule. However, BIS believes that increased burden imposed by those actions will be offset substantially by the reduction in burden attributable to the moving of items from the USML to CCL and the compliance benefits associated with the consolidation of all WAML items subject to the EAR in one series of ECCNs.

Conclusion

BIS is unable to determine the precise number of small entities that would be affected by this rule. Based on the facts and conclusions set forth above, BIS believes that any burdens imposed by this rule would be offset by the reduction in the number of items that would require a license, increased opportunities for use of license exceptions for exports to certain countries, simpler export license applications, reduced or eliminated registration fees and application of a *de minimis* threshold for foreign-made items incorporating U.S.-origin parts and components, which would reduce the incentive for foreign buyers to design out or avoid U.S.-origin content. For these reasons, the Chief Counsel for Regulations of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities.

List of Subjects

15 CFR Parts 738, 770 and 772

Exports.

15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 742

Exports, Terrorism.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Export Administration Regulations (15 CFR parts 730–774) are proposed to be amended as follows:

15 CFR PART 738—[AMENDED]

1. The authority citations paragraph for part 738 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c; 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 15 U.S.C. 1824a; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

2. Section 738.2(d)(2)(ii) is amended by adding a sentence immediately following the fifth sentence that reads as follows:

§ 738.2 Commerce Control List (CCL) structure.

* * * * *

(d) * * *

(2) * * *

(ii) * * * In some ''600 series'' ECCNs, the STA license exception paragraph or a note to the License Exceptions section contains additional information about License Exception STA applicability to that ECCN.

15 CFR PART 740—[AMENDED]

3. The authority citations paragraph for part 740 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 7201 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp.,

p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

4. Section 740.2 is amended by adding a paragraph (a)(13) to read as follows:

§ 740.2 Restriction on all license exceptions.

(a) * * *

(13) Items classified under the ''600 series'' are not eligible for any license exception, except as described in paragraph (a)(13)(i), (ii), or (iii) of this section. For MT-controlled items, including ''600 series'' ECCNs, see the restrictions on all license exceptions in paragraph (a)(5) of this section. Under the restriction in paragraph (a)(5), no such ''600 series'' ECCNs are eligible for license exceptions. You may not use a license exception to authorize a MT-controlled item in the ''600 series.''

(i) ''600 series'' ''end items'' may only be authorized by the following license exceptions:

(A) License Exception LVS (§ 740.3);

(B) License Exception TMP (§ 740.9);

(C) License Exception RPL (§ 740.10);

(D) License Exception GOV (§ 740.11(b)(2)(ii) or (b)(2)(iii)). License Exception GOV paragraph (b)(2)(iii) is only available for countries listed in § 740.20(c)(1); or

(E) License Exception STA under § 740.20(c)(1), provided License Exception STA has been identified by BIS in writing or published as an eligible license exception for the particular ''600 series'' ''end item'' in response to a License Exception STA eligibility request in accordance with § 740.20(g) of the EAR and the ultimate end use for the end item is by a government in one of the countries listed in § 740.20(c)(1) or by the United States Government, or is for the ''development'' or ''production'' of an item for use by one of those governments or a person in the United States. Except for MT-controlled items, exports and reexports to non-governmental end users in a country listed in § 740.20(c)(1) are authorized through License Exception STA under § 740.20(c)(1) so long as the item at issue at the time of export, reexport, or transfer (in-country) is ultimately destined for end use by the armed forces, police, paramilitary, law enforcement, customs, correctional, fire, and search and rescue agencies of a government of one of the § 740.20(c)(1) countries or by the United States Government, or is for the ''development'' or ''production'' of an item for use by one of those agencies of those governments or a person in the United States.

(ii) ''600 series'' ''parts,'' ''components,'' ''accessories'' and ''attachments,'' or any item classified in a ''600 series'' product group B or C ECCN may only be authorized by the following license exceptions:

(A) License Exception LVS (§ 740.3);

(B) License Exception TMP (§ 740.9);

(C) License Exception RPL (§ 740.10);

(D) License Exception GOV (§ 740.11(b)(2)(ii) or (b)(2)(iii)). License Exception GOV paragraph (b)(2)(iii) is only available for countries listed in § 740.20(c)(1) ; or

(E) License Exception STA under § 740.20(c)(1), provided the ultimate end use for the ''parts,'' ''components,'' ''accessories and attachments'' or for any item classified in a ''600 series'' product group B or C ECCN is by a government in one of the countries listed in § 740.20(c)(1) or by the United States Government, or is for the ''development'' or ''production'' of an item for use by one of those governments or a person in the United States. Exports and reexports to non-governmental end users in a country listed in § 740.20(c)(1) are authorized through License Exception STA under § 740.20(c)(1) so long as the item at issue at the time of export, reexport, or transfer (in-country) is ultimately destined for end use by the armed forces, police, paramilitary, law enforcement, customs, correctional, fire, and search and rescue agencies of a government of one of the § 740.20(c)(1) countries or by the United States Government, or is for the ''development'' or ''production'' of an item for use by one of those agencies of those governments or a person in the United States. This paragraph does not alter the limitations on the use of License Exception STA contained in § 740.20(b)(2).

(iii) ''600 series'' ''software'' and ''technology'' may only be authorized by the following license exceptions:

(A) License Exception GOV (§ 740.11(b)(2)(ii) or (b)(2)(iii)). License Exception GOV paragraph (b)(2)(iii) is only available for countries listed in § 740.20(c)(1);

(B) License Exception TSU (§ 740.13(a) or (b)); or

(C) License Exception STA (§ 740.20(c)(1)), provided the ultimate end use for the ''software'' or ''technology'' is by a government in one of the countries listed in § 740.20(c)(1) or by the United States Government, or is for the ''development'' or ''production'' of an item for use by one of those governments or a person in the United States. Exports and reexports to non-governmental end users in a country listed in § 740.20(c)(1) are authorized through License Exception STA under § 740.20(c)(1) so long as the item at issue at the time of export, reexport or transfer (in-country) is ultimately destined for end use by the armed forces, police, paramilitary, law enforcement, customs, correctional, fire, and search and rescue agencies of a government of one of the § 740.20(c)(1) countries or by the United States Government, or is for the ''development'' or ''production'' of an item for use by one of those agencies of those governments or a person in the United States. This paragraph does not alter the limitations on the use of License Exception STA contained in § 740.20(b)(2).

* * * * *

5. Section 740.11 is amended by:

a. adding a new paragraph (a)(5),

b. revising paragraph (b)(2)(iii)(A),

c. revising paragraph (b)(2)(iv)(A),

d. revising paragraphs (c)(2)(ii) and (c)(2)(iii) and adding a new paragraph (c)(2)(iv), and

e. adding a note to paragraph (d)(1), to read as follows:

§ 740.11 Governments, international organizations, international inspections under the Chemical Weapons Convention, and the international space station (GOV).

* * * * *

(a) * * *

(5) This paragraph (a) does not authorize exports or reexports of technology prohibited by Supplement No. 4 to this part.

(b) * * *

(2) * * *

(iii)(A) *Items for official use within national territory by agencies of cooperating governments.* This License Exception is available for all items consigned to and for the official use of any agency of a cooperating government within the territory of any cooperating government, except items described in paragraph (a) of Supplement No. 1 to this section and technology prohibited by Supplement No. 4 to this part.

* * * * *

(iv) (A) *Diplomatic and consular missions of a cooperating government.* This License Exception is available for all items consigned to and for the official use of a diplomatic or consular mission of a cooperating government located in any country in Country Group B (see Supplement No. 1 to part 740), except items described in paragraph (b) of Supplement No. 1 to this section and technology prohibited by Supplement No. 4 to this part.

* * * * *

(c) * * *

(2) * * *

(ii) Inspection samples collected in the U.S. pursuant to the Convention;

(iii) Commodities and software that are no longer in OPCW official use (such items must be disposed of in accordance with the EAR); and

(iv) Technology prohibited by Supplement No. 4 to this part.

* * * * *

(d) * * *

(1) * * *

Note to paragraph (d)(1). This paragraph (d) does not authorize any export or reexport prohibited by Supplement No. 4 to this part.

6. Section 740.20 is amended by adding a paragraph (b)(3) and a note to paragraph (c)(1) to read as follows:

§ 740.20 License Exception Strategic Trade Authorization (STA).

* * * * *

(b) * * *

(3) License Exception STA may not be used to export, reexport, or transfer (in-country) any technology prohibited by Supplement No. 4 to this part.

* * * * *

(c) * * *

Note to paragraph (c)(1). License Exception STA under § 740.20(c)(1) may be used to authorize the export, reexport, or transfer (in-country) of ''600 series'' items, provided the ultimate end use for such items is by, or for the ''production'' or ''development'' of an item to be used by, the armed forces, police, paramilitary, law enforcement, customs, correctional, fire, and search and rescue agencies of one of the countries listed in § 740.20(c)(1) or the United States Government or a person in the United States. For ''600 series'' end items, see paragraph (g) of this section. This means that exports and reexports to non-governmental end users in a country listed in § 740.20(c)(1) are authorized through License Exception STA under § 740.20(c)(1) so long as the item at issue at the time of export, reexport, or transfer (in-country) is ultimately destined for either (i) end use by the armed forces, police, paramilitary, law enforcement, customs, correctional, fire, and search and rescue agencies of a government of one of the § 740.20(c)(1) countries or the United States Government; or (ii) the ''production'' or ''development'' of an item for ultimate end use by such a government entity in one of the § 740.20(c)(1) countries or the United States Government or a person in the United States. This provision does not alter the limitations on the use of License Exception STA contained in § 740.20(b)(2).

* * * * *

7. Part 740 is amended by adding a Supplement No. 4 to read as follows:

Supplement No. 4 to Part 740—600 Series Items Subject to Limits Regarding License Exceptions GOV and STA

This supplement lists certain parts and components that are classified under the .x paragraphs of ''600 series'' ECCNs and imposes limitations on the use of License Exceptions GOV (§ 740.11 of the EAR) and STA (§ 740.20 of the EAR) with respect to exports, reexports, and transfers (in-country) of ''development'' and ''production'' software or technology related to those parts and components. The restrictions and the parts and components are listed by Commerce Control List category.

(a) *Restrictions applicable to Category 9.* License Exception STA may not be used to export, reexport, or transfer (in-country) ECCN 9D610 ''software'' or ECCN 9E610 ''technology'' (other than ''build-to-print technology'') for the ''development'' or ''production'' of any of the types of ''parts'' or ''components'' listed below. In addition, License Exception GOV may not be used to export or reexport ECCN 9D610 ''software'' or ECCN 9E610 ''technology'' (other than ''build-to-print technology'') for the ''development'' or ''production'' of any of the types of ''parts'' or ''components'' listed below, except with respect to exports, reexports, and transfers (in-country) to U.S. government agencies and personnel identified in § 740.11(b)(2)(i) and (ii).

(1) Static structural members;

(2) Exterior skins, removable fairings, non-removable fairings, radomes, access doors and panels, and in-flight opening doors;

(3) Control surfaces, leading edges, trailing edges, and leading edge flap seals;

(4) Leading edge flap actuation system commodities (*i.e.,* power drive units, rotary geared actuators, torque tubes, asymmetry brakes, position sensors, and angle gearboxes) ''specially designed'' for fighter, attack, or bomber aircraft controlled in USML Category VIII;

(5) Engine inlets and ducting;

(6) Fatigue life monitoring systems ''specially designed'' to relate actual usage to the analytical or design spectrum and to compute amount of fatigue life ''specially designed'' for aircraft controlled by either USML subcategory VIII(a) or ECCN 9A610.a, except for Military Commercial Derivative Aircraft;

(7) Landing gear, and ''parts'' and ''components'' ''specially designed'' therefor, ''specially designed'' for use in aircraft weighing more than 21,000 pounds controlled by either USML subcategory VIII(a) or ECCN 9A610.a, except for Military Commercial Derivative Aircraft;

(8) Conformal fuel tanks and ''parts'' and ''components'' ''specially designed'' therefor;

(9) Electrical ''equipment,'' ''parts,'' and ''components'' ''specially designed'' for electro-magnetic interference (EMI)—*i.e.,* conducted emissions, radiated emissions, conducted susceptibility and radiated susceptibility—protection of aircraft that conform to the requirements of MIL–STD–461;

(10) HOTAS (Hand-on Throttle and Stick) controls, HOCAS (Hands on Collective and Stick), Active Inceptor Systems (*i.e.,* a combination of Active Side Stick Control Assembly, Active Throttle Quadrant Assembly, and Inceptor Control Unit), rudder pedal assemblies for digital flight control systems, and parts and components ''specially designed'' therefor;

(11) Integrated Vehicle Health Management Systems (IVHMS), Condition Based Maintenance (CBM) Systems, and Flight Data Monitoring (FDM) systems;

(12) Equipment ''specially designed'' for system prognostic and health management of aircraft;

(13) Active Vibration Control Systems;

(14) Fuel Cells ''specially designed'' for use in UAV or Lighter-than-Air-Vehicles; or

(15) Self-sealing fuel bladders ''specially designed'' to pass a .50 caliber or larger gunfire test (MIL–DTL–5578, MIL–DTL–27422).

(b) RESERVED

15 CFR PART 742—[AMENDED]

8. The authority citations paragraph for part 742 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; Sec 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Notice of November 4, 2010, 75 FR 68673 (November 8, 2010); Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

9. Section 742.6 is amended by revising paragraph (a)(1) and by adding a sentence immediately following the first sentence of paragraph (b)(1) to read as follows:

§ 742.6 Regional stability.

(a) * * *

(1) *RS Column 1 License Requirements in General.* As indicated in the CCL and in RS column 1 of the Commerce Country Chart (see Supplement No. 1 to part 738 of the EAR), a license is required to all destinations, except Canada, for items described on the CCL under ECCNs 0A521; 0A606 (except 0A606.y); 0B521; 0B606 (except 0B606.y); 0C521; 0C606 (except 0C606.y); 0D521; 0D606 (except 0D606.y); 0E521; 0E606 (except 0E606.y); 6A002.a.1, a.2, a.3, .c, or .e; 6A003.b.3, and b.4.a; 6A008.j.1; 6A998.b; 6D001 (only ''software'' for the ''development'' or ''production'' of items in 6A002.a.1, a.2, a.3, .c; 6A003.b.3 and .b.4; or 6A008.j.1); 6D002 (only ''software'' for the ''use'' of items in 6A002.a.1, a.2, a.3, .c; 6A003.b.3 and .b.4; or 6A008.j.1); 6D003.c; 6D991 (only ''software'' for the ''development,'' ''production,'' or ''use'' of equipment classified under 6A002.e or 6A998.b); 6E001 (only ''technology'' for ''development'' of items in 6A002.a.1, a.2, a.3 (except 6A002.a.3.d.2.a and

6A002.a.3.e for lead selenide focal plane arrays), and .c or .e, 6A003.b.3 and b.4, or 6A008.j.1); 6E002 (only ''technology'' for ''production'' of items in 6A002.a.1, a.2, a.3, .c, or .e, 6A003.b.3 or b.4, or 6A008.j.1); 6E991 (only ''technology'' for the ''development,'' ''production,'' or ''use'' of equipment classified under 6A998.b); 6D994; 7A994 (only QRS11–00100–100/101 and QRS11–0050–443/569 Micromachined Angular Rate Sensors); 7D001 (only ''software'' for ''development'' or ''production'' of items in 7A001, 7A002, or 7A003); 7E001 (only ''technology'' for the ''development'' of inertial navigation systems, inertial equipment, and specially designed components therefor for civil aircraft); 7E002 (only ''technology'' for the ''production'' of inertial navigation systems, inertial equipment, and specially designed components therefor for civil aircraft); 7E101 (only ''technology'' for the ''use'' of inertial navigation systems, inertial equipment, and specially designed components for civil aircraft); 9A610 (except 9A610.y); 9B610 (except 9B610.y); 9C610 (except 9C610.y); 9D610 (except ''software'' for the ''development,'' ''production'' operation or maintenance of commodities controlled by 9A610.y, 9B610.y, or 9C610.y) and 9E610 (except ''technology'' for the ''development,'' ''production'' operation, installation, maintenance, repair, or overhaul of commodities controlled by ECCN 9A610.y, 9B610.y, or 9C610.y).

* * *

(b) *Licensing policy.* (1) * * * Applications for export or reexport of items classified under any ''600 series'' ECCN listed in paragraph (a)(1) of this section will also be reviewed in accordance with U.S. arms embargo policies and generally will be denied if destined for a destination in set forth § 740.2(a)(12) of the EAR. Applications for export or reexport of parts, components, accessories, attachments, software, or technology ''specially designed'' or otherwise required for the F–14 aircraft will generally be denied.

* * *

* * * * *

15 CFR PART 770—[AMENDED]

10. The authority citation paragraph for part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

Section 770.2 [Amended]

11. Section 770.2 is amended by removing and reserving paragraph (i).

15 CFR PART 772—[AMENDED]

12. The authority citation paragraph for part 772 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

§ 772.1 [Amended]

13. Section 772.1 is amended by adding in alphabetical order a definition for ''build-to-print technology'' to read as follows:

* * *

''Build-to-Print technology'' is ''production'' ''technology'' that is sufficient for an inherently capable end user to produce or repair a commodity from engineering drawings without (i) Revealing ''development'' ''technology,'' such as design methodology, engineering analysis, detailed manufacturing or process know-how; (ii) revealing the production engineering or process improvement aspect of the ''technology;'' or (iii) requiring assistance from the provider of the technology to produce or repair the commodity. Acceptance, test, or inspection criteria pertaining to the commodity at issue is included within the scope of ''build-to-print technology'' only if it is the minimum necessary to verify that the commodity is acceptable.

* * *

15 CFR PART 774—[AMENDED]

14. The authority citation paragraph for part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.,* 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 15 U.S.C. 1824a; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

15. In Supplement No. 1 to part 774, Category 9, revise Export Control Classification Number 9A018 to read as follows:

Supplement No. 1 to Part 774—the Commerce Control List

* * * * *

9A018 Equipment on the Wassenaar Arrangement Munitions List.

No items currently are in this ECCN. See ECCN 0A606.b.4 for the ground transport vehicles and unarmed all-wheel drive vehicles that immediately prior to [Insert effective date of final rule that moves these vehicles] were classified under 9A018.b. See ECCN 9A610 for the aircraft, aircraft engines, refuelers, ground equipment, parachute, harnesses, instrument flight trainers and parts and accessories and attachments for the forgoing that immediately prior to [Insert effective date of final rule that moves these items] were classified under 9A018.a, .c, .d, .e, or .f.

16. In Supplement No. 1 to part 774, Category 9, add a new Export Control Classification Number 9A610 between Export Control Classification Numbers 9A120 and 9A980 to read as follows:

9A610 Military Aircraft and Related Commodities

Reason for Control: NS, RS, MT, AT

Control(s)	Country chart
NS applies to entire entry except 9A610.l, m, n, and y	NS Column 1.
RS applies to entire entry except 9A610.y	RS Column 1.
MT applies to 9A610.l, .m, and .n	MT Column 1.
AT applies to entire entry	AT Column 1.

License Exceptions

LVS: $1500

GBS: N/A

CIV: N/A

STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2)) of the EAR may not be used for any item in 9A610. Paragraph (c)(1) of License Exception STA (§ 740.20(c)(1)) may not be used for any ''end item'' in 9A610, unless determined by BIS to be eligible for License Exception STA in accordance with § 740.20(g) (License Exception STA eligibility requests for ''600 series'' end items). See § 740.20(g) for the procedures to follow if you wish to request new STA eligibility for ''end items'' under this ECCN 9A610 as part of an export, reexport, or transfer (in-country) license application. ''End items'' under this entry that have already been determined to be eligible for License Exception STA are listed in Supplement No. 4 to part 774 and on the BIS Web site at www.bis.doc.gov.

Paragraph (c)(1) of License Exception STA (§ 740.20(c)(1)) may be used for items in 9A610.x without the need for a determination described in § 740.20(g).

List of Items Controlled

Unit: End items in number; parts, component, accessories and attachments in $ value.

Related Controls: Military aircraft and related articles that are enumerated in USML Category VIII, and technical data (including software) directly related thereto, are subject to the ITAR. See ECCN 0A919 for foreign-made ''military commodities'' that incorporate more than 10% U.S.-origin ''600 series'' items.

Items:

a. ''Military Aircraft'' ''specially designed'' for a military use that are not enumerated in USML paragraph VIII(a).

Note 1: For purposes of paragraph .a the term ''military aircraft'' includes the following types of aircraft to the extent they were ''specially designed'' for a military use and are not enumerated in USML paragraph VIII(a): trainer aircraft; cargo aircraft; utility fixed wing aircraft; military helicopters; observation aircraft; military non-expansive balloons and other lighter than air aircraft and unarmed military aircraft, regardless of origin or designation, manufactured before 1956 and unmodified since manufacture. Aircraft with modifications made to incorporate safety of flight features or other FAA or NTSB modifications such as transponders and air data recorders are ''unmodified'' for the purposes of this paragraph .a.

b. [Reserved].

c. [Reserved].

d. [Reserved].

e. [Reserved].

f. Pressure refuelers, pressure refueling ''equipment,'' ''equipment'' ''specially designed'' to facilitate operations in confined areas, and ground equipment ''specially designed'' for aircraft controlled by either USML paragraph VIII(a) or ECCN 9A610.a.

g. Military crash helmets and protective masks, pressurized breathing equipment and partial pressure suits for use in aircraft controlled by either USML paragraph VIII(a) or ECCN 9A610.a, anti-g suits, liquid oxygen converters ''specially designed'' for aircraft controlled by either USML subcategory VIII(a) or ECCN 9A610.a, and catapults and cartridge actuated devices for emergency escape of personnel from aircraft controlled by either USML subcategory VIII(a) or ECCN 9A610.a.

h. Canopies, harnesses, platforms, electronic release mechanisms ''specially designed'' for use with aircraft controlled by either USML paragraph VIII(a) or ECCN 9A610.a, parachutes and paragliders ''specially designed'' or modified for military use, and ''equipment'' ''designed'' or modified for military high altitude parachutists, such as suits, special helmets, breathing systems, and navigation equipment.

i. Automatic piloting systems for parachuted loads; equipment ''specially designed'' for military use for controlled opening jumps at any height, including oxygen equipment.

j. Ground effect machines (GEMS), including surface effect machines and air cushion vehicles, ''specially designed'' for use by a military.

k. Military aircraft instrument flight trainers that are not ''specially designed'' to simulate combat. (See USML Cat IX for controls on such trainers that are ''specially designed'' to simulate combat).

l. Apparatus and devices designed or modified for the handling, control, activation or launching of UAVs or drones controlled by either USML paragraph VIII(a) or ECCN 9A610.a, and capable of a range equal to or greater than 300 km.

m. Radar altimeters designed or modified for use in UAVs or drones controlled by either USML paragraph VIII(a) or ECCN 9A610.a., and capable of delivering at least 500 kilograms payload to a range of at least 300 km.

n. Hydraulic, mechanical, electro-optical, or electromechanical flight control systems (including fly-by-wire systems) and attitude control equipment designed or modified for UAVs or drones controlled by either USML paragraph VIII(a) or ECCN 9A610.a., and capable of delivering at least 500 kilograms payload to a range of at least 300 km.

o. through w. [Reserved]

x. ''Parts,'' ''components,'' ''accessories and attachments'' that are ''specially designed'' for a commodity subject to control in paragraphs .a through .k of this ECCN or a defense article in USML Category VIII and not elsewhere specified on the USML or the CCL.

Note 1: Forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by material composition, geometry, or function as commodities controlled by ECCN 9A610.x are controlled by ECCN 9A610.x.

Note 2: ''Parts,'' ''components,'' ''accessories and attachments'' specified in USML subcategory VIII(f) or VIII(h) are subject to the controls of that paragraph. ''Parts,'' ''components,'' ''accessories and attachments'' specified in ECCN 9A610.y are subject to the controls of that paragraph.

y. Specific ''parts,'' ''components,'' ''accessories and attachments'' ''specially designed'' for a commodity subject to control in this ECCN or a defense article in USML Category VIII and not elsewhere specified in the USML or the CCL, and other aircraft commodities ''specially designed'' for a military use, as follows:

y.1. Aircraft tires;

y.2. Analog cockpit gauges and indicators;

y.3. Audio selector panels;

y.4. Check valves for hydraulic and pneumatic systems;

y.5. Crew rest equipment;

y.6. Ejection seat mounted survival aids;

y.7. Energy dissipating pads for cargo (for pads made from paper or cardboard);

y.8. Filters and filter assemblies for hydraulic, oil and fuel systems;

y.9. Galleys;

y.10. Hydraulic and fuel hoses, straight and unbent lines, fittings, clips, couplings, nutplates, and brackets;

y.11. Lavatories;

y.12. Life rafts;

y.13. Magnetic compass, magnetic azimuth detector;

y.14. Medical litter provisions;

y.15. Mirrors, cockpit;

y.16. Passenger seats including palletized seats;

y.17. Potable water storage systems;

y.18. Public address (PA) systems;

y.19. Steel brake wear pads (does not include sintered mix or carbon/carbon materials)

y.20. Underwater beacons;

y.21. Urine collection bags/pads/cups/pumps;

y.22. Windshield washer and wiper systems;

y.23. Filtered and unfiltered cockpit panel knobs, indicators, switches, buttons, and dials;

y.24. Lead-acid and Nickel-Cadmium batteries; and

y.25. Propellers, propeller systems, and propeller blades used with reciprocating engines.

y.26. to y.98. [RESERVED]

y.99. Commodities that would otherwise be controlled elsewhere in this entry but that (i) Have been determined to be subject to the EAR in a commodity jurisdiction determination issued by the U.S. Department of State and (ii) are not otherwise identified elsewhere on the CCL.

17. In Supplement No. 1 to part 774, Category 9, add a new Export Control Classification Number 9B610 between Export Control Classification Numbers 9B117 and 9B990 to read as follows:

9B610 Test, Inspection, and Production ''Equipment'' and Related Commodities ''Specially Designed'' for the ''Development'' or ''Production'' of Commodities Enumerated in ECCN 9A610 or USML Category VIII.

License Requirements

Reason for Control: NS, RS, MT, AT

Control(s)	Country chart
NS applies to entire entry except 9B610.c and 9B610.y	NS Column 1.
RS applies to entire entry except 9B610.y	RS Column 1.
MT applies to 9B610.c	MT Column 1.
AT applies to entire entry	AT Column 1.

License Exceptions

LVS: $1500
GBS: N/A
CIV: N/A
STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2)) of the EAR may not be used for any item in 9B610. Paragraph (c)(1) of License Exception STA (§ 740.20(c)(1)) may be used for items in 9A610.x without the need for a determination described in § 740.20(g).

List of Items Controlled

Unit: N/A
Related Controls:
Related Definitions: N/A
Items:
a. Test, inspection, and production ''equipment'' ''specially designed'' for the ''production'' or ''development'' of commodities enumerated in ECCN 9A610 (except 9A610.y) or USML Category VIII, and ''parts,'' ''components,'' ''accessories and attachments'' ''specially designed'' therefor.
b. Environmental test facilities designed or modified for the certification, qualification, or testing of commodities enumerated in ECCN 9A610 (except for 9A610.y) or USML Category VIII and ''parts,'' ''components,'' ''accessories and attachments'' ''specially designed'' therefor.
c. ''Production facilities'' ''specially designed'' for UAVs or drones that are (i) controlled by either USML paragraph VIII(a) or ECCN 9A610.a and (ii) capable of a range equal to or greater than 300 km.
d. through x. [RESERVED]
y. Specific test, inspection, and production ''equipment'' ''specially designed'' for the ''production'' or ''development'' of commodities enumerated in ECCN 9A610 (except for 9A610.y) or USML Category VIII and ''parts,'' ''components,'' ''accessories and attachments'' ''specially designed'' therefor, as follows:
y.1. through y.98 [RESERVED]
y.99. Commodities that would otherwise be controlled elsewhere in this entry but that (i) have been determined to be subject to the EAR in a commodity jurisdiction determination issued by the U.S. Department of State and (ii) are not otherwise identified elsewhere on the CCL.

18. In Supplement No. 1 to part 774, Category 9, add a new Export Control Classification Number 9B610 between Export Control Classification Numbers 9C110 and the product group header that reads ''D. Software'' to read as follows:

9C610 Materials ''Specially Designed'' for Commodities Controlled by 9A610 not Elsewhere Specified in the CCL or the USML.

License Requirements

Reason for Control: NS, RS, AT

Control(s)	Country chart
NS applies to entire entry except 9C610.y	NS Column 1.
RS applies to entire entry except 9C610.y	RS Column 1.
AT applies to entire entry	AT Column 1.

License Exceptions

LVS: $1500
GBS: N/A
CIV: N/A
STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2)) of the EAR may not be used for any item in 9C610.

List of Items Controlled

Unit: N/A
Related Controls: USML subcategory XIII(f) controls structural materials specifically designed, developed, configured, modified, or adapted for defense articles, such as USML subcategory VIII(a) aircraft. See ECCN 0A919 for foreign made ''military commodities'' that incorporate more than 10% U.S.-origin ''600 series'' items.
Related Definitions: N/A
Items:
a. Materials ''specially designed'' for commodities enumerated in ECCN 9A610 (except 9A610.y) not elsewhere specified in the USML or the CCL.

Note 1: Materials enumerated elsewhere in the CCL, such as in a CCL Category 1 ECCN, are controlled pursuant to controls of the applicable ECCN.

Note 2: Materials ''specially designed'' for an aircraft enumerated in USML Category VIII and for an aircraft enumerated in ECCN 9A610 are subject to the controls of this ECCN.

b. to .x. [RESERVED]
y. Specific materials ''specially designed'' for commodities enumerated in ECCN 9A610 (except for 9A610.y), as follows:
y.1. through y.98 [RESERVED]
y.99. Materials that would otherwise be controlled elsewhere in this entry but that (i) have been determined to be subject to the EAR in a commodity jurisdiction determination issued by the U.S. Department of State and (ii) are not otherwise identified elsewhere on the CCL.

19. In Supplement No. 1, Category 9, revise Export Control Classification Number 9D018 to read as follows:

9D018 ''Software'' for the ''use'' of Equipment Controlled by 9A018.

No items currently are in this ECCN. See ECCN [Insert appropriate Category 0 ECCN] for ''software'' related to the ground transport vehicles and unarmed all-wheel drive vehicles that immediately prior to [Insert effective date of final rule that moves these vehicles] were classified under 9A018.b. See ECCN 9D610 for ''software'' related to the aircraft, refuelers, ground equipment, parachute, harnesses, instrument flight trainers, and parts and accessories and attachments for the forgoing that immediately prior to [Insert effective date of final rule that moves these items] were classified under 9A018.a, .c, .d, .e, or .f.

20. In Supplement No. 1, Category 9, add a new Export Control Classification Number 9D610 between Export Control Classification Numbers 9D105 and 9D990 to read as follows:

9D610 ''Software'' ''Specially Designed'' for the ''Development,'' ''Production'' Operation Installation, Maintenance, Repair, Overhaul or Refurbishing of Military Aircraft and Related Commodities Controlled by 9A610, Equipment Controlled by 9B610, or Materials Controlled by 9C610 as Follows (See List of Items Controlled).

License Requirements

Reason for Control: NS, RS, MT, AT

Control(s)	Country chart
NS applies to 9D610.a	NS Column 1.
RS applies to 9D610.a and .b	RS Column 1.
MT applies to 9D610.c	MT Column 1.
AT applies to entire entry	AT Column 1.

License Exceptions

CIV: N/A
TSR: N/A

STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2))of the EAR may not be used for any ''software'' in 9D610.

Note to License Exceptions Section: Supplement No. 4 to part 740 precludes use of License Exceptions GOV (other than those provisions authorizing exports and reexports to personnel and agencies for the U.S. government) and STA with respect to ''development'' and ''production'' ''software''

for specific types of ''parts'' and ''components'' controlled by ECCN 9A610.x. and identified in the supplement.

List of Items Controlled

Unit: $ value

Related Controls: ''Software'' directly related to articles enumerated in USML Category VIII is subject to the control of USML paragraph VIII(i). See ECCN 0A919 for foreign made ''military commodities'' that incorporate more than 10% U.S.-origin ''600 series'' items.

Related Definitions: N/A

Items:

a. ''Software'' (other than software controlled in paragraph .y of this entry) ''specially designed'' for the ''development,'' ''production,'' operation or maintenance of commodities controlled by ECCN 9A610 (except 9A610.l, .m, .n, or .y), ECCN 9B610 (except 9B610.c or .y), or ECCN 9C610 (except 9C610.y).

b. ''Software'' (other than software controlled in paragraph .y of this entry) ''specially designed'' for the ''development,'' ''production,'' operation or maintenance of commodities controlled by ECCN 9A610.l, .m, or .n; or ECCN 9B610.c.

c. Software'' (other than software controlled in paragraph .y of this entry) ''specially designed'' for the ''development,'' ''production,'' operation, installation, maintenance, repair, overhauling or refurbishing of commodities controlled by ECCN 9A610.l, .m, or .n; or ECCN 9B610.c

d. to x. [RESERVED]

y. Specific ''software'' ''specially designed'' for the ''production,'' ''development,'' or operation or maintenance of commodities enumerated in ECCN 9A610, 9B610, or 9C610, as follows:

y.1. Specific ''software'' ''specially designed'' for the ''production,'' ''development,'' operation or maintenance of commodities enumerated in ECCN 9A610.y, 9B610.y, or 9C610.y.

y.2 through y.98 [RESERVED]

y.99. Software that would otherwise be controlled elsewhere in this entry but that (i) has been determined to be subject to the EAR in a commodity jurisdiction determination issued by the U.S. Department of State and (ii) is not otherwise identified elsewhere on the CCL.

21. In Supplement No. 1, Category 9, revise Export Control Classification Number 9E018 to read as follows:

9E018 Technology for the ''use'' of Equipment Controlled by 9A018.

No items currently are in this ECCN. See ECCN 0E606 for technology related to the ''required'' for the ''development,'' ''production,'' operation, installation, maintenance, repair, overhaul, or refurbishing of commodities or software controlled by ECCN 9A610, 9B610, 9C610 or 9D610.

b. through x. [RESERVED]

y. Specific ''technology'' ''required'' for the ''production,'' ''development,'' operation, installation, maintenance, repair, or overhaul of commodities enumerated in ECCN 9A610, 9B610, 9C610, or 9D610, as follows:

y.1. Specific ''technology'' ''required'' for the ''production,'' ''development,'' operation, installation, maintenance, repair or overhaul of commodities enumerated in ECCN 9A610.y, 9B610.y, 9C610.y, or 9D610.y.

y.2. through y.98 [RESERVED]

y.99. ''Technology'' that would otherwise be controlled elsewhere in this entry but that (i) has been determined to be subject to the EAR in a commodity jurisdiction determination issued by the U.S. Department of State and (ii) is not otherwise identified elsewhere on the CCL.

22. In Supplement No. 1, Category 9, add a new Export Control Classification Number 9E610 between Export Control Classification Numbers 9E102 and 9E990 to read as follows:

9E610 Technology ''Required'' for the ''Development,'' ''Production,'' Operation, Installation, Maintenance, Repair, Overhaul or Refurbishing of Military Aircraft and Related Commodities Controlled by 9A610, Equipment Controlled by 9B610, Materials Controlled by 9C610, or ''Software'' Controlled by 9D610 as Follows (See List of Items Controlled).

License Requirements

Reason for Control: NS, RS, MT, AT

Control(s)	Country chart
NS applies to technology as described in paragraph .a of this entry for commodities and software that are controlled for NS reasons in ECCNs 9A610, 9B610, 9C610 or 9D610.	NS Column 1.
RS applies to technology as described in paragraph .a of this entry for commodities and software controlled for RS reasons in 9A610, 9B610, 9C610 or 9D610.	RS Column 1.
MT applies to technology as described in paragraph .a of this entry for commodities and software controlled for MT reasons in ECCNs 9A610, 9B610 or 9D610.	MT Column 1.
AT applies to entire entry	AT Column 1.

License Exceptions

CIV: N/A

TSR: N/A

STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2)) of the EAR may not be used for any technology in 9E610.

Note to License Exceptions Section: Supplement No. 4 to part 740 limits use of License Exceptions GOV (other than those provisions authorizing exports and reexports to personnel and agencies for the US government) and STA with respect to ''development'' and ''production'' ''technology'' for specific types of ''parts'' and ''components'' controlled by ECCN 9A610.x. and identified in the supplement other than ''build-to-print technology.''

List of Items Controlled

Unit: $ value

Related Controls: Technical data directly related to articles enumerated in USML Category VIII are subject to the control of USML paragraph VIII(i). See ECCN 0A919 for foreign made ''military commodities'' that incorporate more than 10% U.S.-origin ''600 series'' items.

Related Definitions: N/A

Items:

a. ''Technology'' (other than technology controlled by paragraph .y of this entry)

Dated: October 28, 2011.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2011–28504 Filed 11–4–11; 8:45 am]

BILLING CODE 3510–33–P

FEDERAL TRADE COMMISSION

16 CFR Part 303

Rules and Regulations Under the Textile Fiber Products Identification Act

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Advance notice of proposed rulemaking; request for public comment.

SUMMARY: The Commission systematically reviews all its rules and guides to ensure that they continue to achieve their intended purpose without unduly burdening commerce. As part of this systematic review, the Commission requests public comment on the overall

costs, benefits, necessity, and regulatory and economic impact of the FTC's Rules and Regulations pursuant to the Textile Fiber Products Identification Act. The Commission specifically requests comment on whether it should: Modify the provision addressing generic fiber names so that the reference to the international standard for manufactured fibers reflects the updated standard; clarify the provisions addressing textile products containing elastic material and ''trimmings''; address the use of multiple languages in making required disclosures; clarify disclosure requirements applicable to written advertising, including Internet advertising; clarify or revise the list of exclusions from the Textile Fiber Products Identification Act; add or clarify definitions of terms set forth in the Rules; and modify its consumer and business education materials and continue printing paper copies of these materials. In addition, the Commission seeks comment on: the benefits and costs of the requirement of the Textile Fiber Products Identification Act that, under certain circumstances, businesses use identification issued by the FTC; and the extent to which retailers obtain guarantees and continuing guarantees for textile products and whether the extent or manner of importation indicates that the guarantee provisions of the Act and Rules should be modified.

DATES: Comments must be received on or before January 3, 2012.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Textile Rules, 16 CFR Part 303, Project No. P948404'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/textilerulesanpr* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex G), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Robert M. Frisby, Attorney, (202) 326–2098, or Edwin Rodriguez, Attorney, (202) 326–3147, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The Textile Fiber Products Identification Act (''Textile Act''), 15 U.S.C. 70–70k, requires marketers to attach a label to each covered textile product disclosing: (1) The generic names and percentages by weight of the constituent fibers in the product; (2) the name under which the manufacturer or other responsible company does business or, in lieu thereof, the registered identification number (''RN number'') of such company; and (3) the name of the country where the product was processed or manufactured. The Textile Act also contains advertising and record-keeping provisions.

Section 7(c) of the Textile Act authorizes the Commission to ''make such rules and regulations, including the establishment of generic names of manufactured fibers * * * as may be necessary and proper for administration and enforcement.'' 15 U.S.C. 70e(c). Pursuant to the Textile Act, the Commission promulgated the Rules and Regulations Under the Textile Fiber Products Identification Act (''Textile Rules'' or ''Rules''), 16 CFR Part 303.

The Commission completed its last review of the Rules in 1998, and modified the Rules nine times during the period 1998 to 2009. Specifically, as a result of the 1998 review, the Commission, among other things, streamlined the labeling requirements and approved additional generic fiber names through the incorporation of ISO 2076: 1998, ''Textiles—Man-made fibres—Generic Names'' in Section 303.7.[1] Later in 1998, the Commission amended the Rules to update Commission addresses.[2] In 2000, it amended the Rules to revise the RN number application process, to reference an updated version of ISO 2076 (ISO 2076: 1999(E)—the standard currently set forth in Section 303.7), and to clarify the country-of-origin disclosure requirements.[3] In 2005, the Commission amended the Rules to implement changes mandated by Congress to the country-of-origin disclosure requirements for socks.[4] In addition, during the 1998–2009 period, the Commission amended the Rules five times in response to petitions from textile fiber manufacturers to recognize new generic fiber names or subclasses thereof.[5]

II. Regulatory Review Program

Since 1992, the Commission's regulatory review program has systematically reviewed Commission regulations to ensure that they continue to achieve their intended goals without unduly burdening commerce. The Commission schedules its regulations and guides for review on a ten-year cycle; *i.e.,* all rules and guides are scheduled to be reviewed ten years after implementation and ten years after the completion of each review. The Commission publishes this schedule annually, with adjustments in response to public input, changes in the marketplace, and resource demands.[6]

When the Commission reviews a rule or guide, it publishes a notice in the **Federal Register** seeking public comment on the continuing need of the rule or guide as well as its costs and benefits to consumers and businesses. Based on this feedback, the Commission may modify or repeal the rule or guide to address public concerns or changed conditions, or to reduce undue regulatory burden. Therefore, the Commission now solicits comments on, among other things, the economic impact of, and the continuing need for, the Textile Rules; the benefits of the Rules to consumers purchasing products covered by them; and the burdens the Rules place on businesses.[7]

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[1] *Federal Trade Commission: Rules and Regulations Under the Textile Fiber Products Identification Act, the Wool Products Labeling Act, and the Fur Products Labeling Act: Final Rule,* 63 FR 7508 (Feb. 13, 1998).

[2] *Federal Trade Commission: Miscellaneous Rules: Final Rule,* 63 FR 71582 (Dec. 29, 1998).

[3] *Federal Trade Commission: Rules and Regulations Under the Textile Fiber Products Identification Act; Rules and Regulations Under the Wool Products Labeling Act of 1939, Final Rule,* 65 FR 75154 (Dec. 1, 2000).

[4] *Federal Trade Commission: Rules and Regulations Under the Textile Fiber Products Identification Act: Final Rule,* 70 FR 73369 (Dec. 12, 2005).

[5] *Federal Trade Commission: Rules and Regulations Under the Textile Fiber Products Identification Act: Final Rule,* 63 FR 36171 (Jul. 2, 1998) (new generic fiber names ''melamine'' and ''fluoropolymer''); *Federal Trade Commission: Rules and Regulations Under the Textile Fiber Products Identification Act: Final Rule,* 67 FR 4901 (Feb. 1, 2002) (new generic fiber name ''PLA''); *Federal Trade Commission: Rules and Regulations Under the Textile Fiber Products Identification Act: Final Rule,* 67 FR 70835 (Nov. 27, 2002) (new generic fiber name ''elasterell-p'' as subclass of generic fiber name ''polyester''); *Federal Trade Commission: Rules and Regulations Under the Textile Fiber Products Identification Act: Final Rule,* 68 FR 3813 (Jan. 27, 2003) (new generic fiber name ''lastol'' as subclass of generic fiber name ''olefin''); *Federal Trade Commission: Rules and Regulations Under the Textile Fiber Products Identification Act: Final Rule,* 74 FR 13099 (Mar. 26, 2009) (new generic fiber name ''triexta'' as subclass of generic fiber name ''polyester'').

[6] *Federal Trade Commission: Notice Announcing Ten-year Regulatory Review Schedule and Request for Public Comment on the Federal Trade Commission's Regulatory Review Program,* 76 FR 41150 (Jul. 13, 2011).

[7] *See* questions 1 through 12 in Section IV below.

III. Specific Issues of Interest to the Commission

As part of this process, the Commission seeks comment on several specific issues stemming from informal inquiries received by Commission staff. These inquiries suggest that clarification or modification of certain Rule provisions, as well as the Commission's consumer and business education materials explaining them, could improve industry and consumer understanding of the requirements of the Textile Act and the Rules or otherwise improve the Rules. Such improvements could foster greater compliance with the Rules and help the FTC implement the Textile Act more effectively. These issues are explained below.

First, the International Standards Organization developed ISO 2076: 2010, an updated version of ISO 2076: 1999(E), ''Textiles—Man-made fibres—Generic Names,'' referenced in Section 303.7. This development may warrant modifying Section 303.7 to incorporate the updated version of ISO 2076.

Second, inquiries regarding the disclosure requirements for products containing elastic material and trimmings suggest a possible need to clarify Sections 303.10 and 303.12 of the Rules.[8] For example, Section 303.10 requires disclosure of elastic material fiber content, yet Section 303.12 states that trimmings (for which the disclosure requirements do not apply) may include elastic material added to a product in minor proportion for holding, reinforcing or similar structural purposes. The Rules do not define or elaborate on the term ''minor proportion.'' In addition, Section 303.12 lists product components or parts that may qualify as trim without otherwise defining the term ''trimmings.''

Third, inquiries regarding the disclosure of fiber content percentages in multiple languages also suggest a possible need to clarify the Rules. Section 303.4 requires label disclosures in English. Labels may include disclosures in other languages; however, Section 303.16(c) provides that such ''non-required'' information ''shall not minimize, detract from, or conflict with required information and shall not be false, deceptive, or misleading.'' Commission staff have received reports that some labels provide fiber content information in English plus other languages. The Commission seeks comment on the voluntary practice of disclosing required information in multiple languages. In particular, the Commission seeks comment on whether voluntary multilingual labeling practices cause consumer confusion, and if so, how to avoid such confusion while providing the benefits of disclosures in multiple languages.

Fourth, inquiries regarding the disclosure requirements applicable to written advertising, including Internet advertising,[9] set forth in Sections 303.41 and 303.42, suggest a possible need for clarification. For example, the Rules do not require the disclosure of fiber content percentages in advertising but perhaps could state this more clearly.[10]

Fifth, inquiries regarding whether the Textile Act and Rules apply to certain products suggest a possible need to clarify Section 303.45. That section excludes all textile fiber products from the operation of the Textile Act except for those products specifically listed as covered under the Rules.[11] The Commission's education materials provide additional guidance on the Rules' coverage by identifying specific items that fall into product categories covered by the Textile Act and Rules, such as ''bedding'' and ''floor coverings,'' and by identifying specific items not covered by the Textile Act and Rules.[12] The Commission is considering clarifying or modifying the Rules to indicate with greater specificity the products either covered by or excluded from the requirements of the Textile Act and Rules.

Sixth, the Rules include a number of undefined textile-related terms. The Commission seeks comment on whether it needs to add or clarify any definitions.

Seventh, the Commission seeks comment on whether it needs to clarify or otherwise modify its consumer and business education materials addressing the Rules. It also seeks comment on whether it should continue to print paper copies of its consumer and business education materials.

In addition, the Commission seeks comment on the benefits and costs of the Textile Act requirement that businesses identify themselves on labels using either their names or identifiers issued by the FTC (*i.e.,* RN numbers).[13] Specifically, the Commission seeks comment on whether allowing alternative identifiers, such as numbers issued by other nations (*e.g.,* Canadian CA numbers), would benefit businesses without imposing costs on consumers and law enforcement that outweigh those benefits.[14]

Finally, the Commission seeks comment on the extent to which retailers obtain guarantees and continuing guarantees. It also seeks comment on the costs of obtaining guarantees for textile products and whether changes in the extent and manner of importation indicate that the guarantee provisions of the Act and Rules should be modified.

IV. Request for Comment

The Commission solicits comments on the following specific questions related to the Textile Rules.

(1) Is there a continuing need for the Rules as currently promulgated? Why or why not?

(2) What benefits have the Rules provided to, or what significant costs have the Rules imposed on, consumers? Provide any evidence supporting your position.

(3) What modifications, if any, should the Commission make to the Rules to increase their benefits or reduce their costs to consumers?

(a) Provide any evidence supporting your proposed modifications.

(b) How would these modifications affect the costs and benefits of the Rules

[8] Section 303.1(n) defines ''elastic material'' as a fabric composed of yarn consisting of an elastomer or a covered elastomer. The Textile Act does not apply to trimmings, 15 U.S.C. 70j(a)(5), but does not define the term.

[9] Internet advertisers must comply with the Rules' advertising disclosure requirements. In 2009, the Commission announced four law enforcement actions involving the use of the word ''bamboo'' in lieu of the generic fiber name ''rayon'' in Internet advertising for textile products, in violation of the Textile Rules. *See http://www.ftc.gov/opa/2009/08/bamboo.shtm.* Last year, the Commission sent warning letters to 78 retailers of textile products, including many on-line marketers, addressing the use of ''bamboo'' in lieu of the generic fiber name ''rayon.'' *See http://www.ftc.gov/opa/2010/02/bamboo.shtm.*

[10] The Textile Act addresses this issue clearly. It requires disclosure of fiber content information in certain advertising, ''except that the percentages of the fiber present in the textile fiber product need not be stated.'' 15 U.S.C. 70b(c).

[11] The Textile Act and Rules apply to textile fiber products with certain exceptions. Covered products include household textile articles made from yarn or fabric and fibers used or intended for use in such articles. The Textile Act provides that the term ''household textile articles'' means articles of wearing apparel, costumes and accessories, draperies, floor coverings, furnishings, beddings, and other textile goods of a type customarily used in a household regardless of where used in fact. *See* 15 U.S.C. 70(g) and (h). Thus, whether the Textile Act and Rules apply to a particular textile product may depend in part on whether it is customarily used in a household. In addition, the Commission has authority to exclude products which have an insignificant or inconsequential textile fiber content and products for which a fiber content disclosure is unnecessary to protect the ultimate consumer. *See* 15 U.S.C. 70j(b).

[12] *See* ''Threading Your Way Through the Labeling Requirements Under the Textile and Wool Acts'' at *http://business.ftc.gov/documents/bus21-threading-your-way-through-labeling-requirements-under-textile-and-wool-acts.*

[13] *See* 15 U.S.C. 70b(b)(3).

[14] *See* questions 13 through 23 in Section IV below.

for consumers and businesses, particularly small businesses?

(4) What impact have the Rules had in promoting the flow of truthful information to consumers and preventing the flow of deceptive information to consumers? Provide any evidence supporting your position.

(5) What benefits, if any, have the Rules provided to, or what significant costs, including costs of compliance, have the Rules imposed on businesses, particularly small businesses? Provide any evidence supporting your position.

(6) What modifications, if any, should be made to the Rules to increase their benefits or reduce their costs to businesses, particularly small businesses?

(a) Provide any evidence supporting your proposed modifications.

(b) How would these modifications affect the costs and benefits of the Rules for consumers and businesses, particularly small businesses?

(7) Provide any evidence concerning the degree of industry compliance with the Rules. Does this evidence indicate that the Rules should be modified? If so, why and how? If not, why not?

(8) Provide any evidence concerning whether any of the Rules' provisions are no longer necessary. Explain why these provisions are unnecessary.

(9) What potentially unfair or deceptive practices concerning textile labeling, not covered by the Rules, are occurring in the marketplace?

(a) Provide any evidence, such as empirical data, consumer perception studies, or consumer complaints, demonstrating the extent of such practices.

(b) Provide any evidence demonstrating whether such practices cause consumer injury.

(c) With reference to such practices, should the Rules be modified? If so, why and how? If not, why not?

(10) What modifications, if any, should be made to the Rules to account for current or impending changes in technology or economic conditions?

(a) Provide any evidence supporting the proposed modifications.

(b) How would these modifications affect the costs and benefits of the Rules for consumers and businesses, particularly small businesses?

(11) Do the Rules overlap or conflict with other Federal, state, or local laws or rules, such as those enforced by U.S. Customs and Border Protection? If so, how?

(a) Provide any evidence supporting your position.

(b) With reference to the asserted conflicts, should the Rules be modified? If so, why and how? If not, why not?

(c) Provide any evidence concerning whether the Rules have assisted in promoting national consistency with respect to textile labeling and advertising.

(12) Are there foreign or international laws, regulations, or standards with respect to textile labeling or advertising that the Commission should consider as it reviews the Rules? If so, what are they?

(a) Should the Rules be modified in order to harmonize with these international laws, regulations, or standards? If so, why and how? If not, why not?

(b) How would such harmonization affect the costs and benefits of the Rules for consumers and businesses, particularly small businesses?

(c) Provide any evidence supporting your position.

(13) Should the Commission modify Section 303.7 to address the development of ISO 2076: 2010, ''Textiles—Man-made fibres—Generic names,'' an updated version of ISO 2076: 1999(E), ''Textiles—Man-made fibres—Generic Names,'' referenced in Section 303.7? If so, why and how? If not, why not?

(a) Provide any evidence supporting your position.

(b) How would the modification affect the costs and benefits of the Rules for consumers and businesses, particularly small businesses?

(14) Should the Commission modify Section 303.1(n), 303.10, or 303.12 to clarify the disclosure requirements relating to products containing elastic material? If so, why and how? If not, why not?

(a) Provide any evidence supporting your position.

(b) How would these modifications affect the costs and benefits of the Rules for consumers and businesses, particularly small businesses?

(15) Should the Commission modify Section 303.12 to revise the description and list of examples of ''trimmings''? If so, why and how? If not, why not?

(a) Provide any evidence supporting your position.

(b) How would these modifications affect the costs and benefits of the Rules for consumers and businesses, particularly small businesses?

(16) Should the Commission modify Section 303.16(c) or consider any additional measures regarding non-required information such as the voluntary use of multilingual labels? In particular, do multilingual labels pose the potential to confuse consumers and, if so, how could such confusion be avoided while providing the benefits of disclosures in multiple languages?

(a) Provide any evidence supporting your position.

(b) How would these modifications affect the costs and benefits of the Rules for consumers and businesses, particularly small businesses?

(17) Should the Commission modify Section 303.41 or 303.42 to clarify or otherwise revise the disclosure requirements applicable to written advertising, including Internet advertising? If so, why and how? If not, why not?

(a) Provide any evidence supporting your position.

(b) How would these modifications affect the costs and benefits of the Rules for consumers and businesses, particularly small businesses?

(18) Should the Commission modify Section 303.45 to clarify or otherwise revise the list of exclusions from the Textile Act and Rules? If so, why and how? If not, why not?

(a) Provide any evidence supporting your position.

(b) How would these modifications affect the costs and benefits of the Rules for consumers and businesses, particularly small businesses?

(19) Should the Commission modify the Rules to add or clarify definitions of terms set forth in the Rules? If so, why and how? If not, why not?

(a) Provide any evidence supporting your position.

(b) How would these modifications affect the costs and benefits of the Rules for consumers and businesses, particularly small businesses?

(20) Is our business compliance guidance and consumer education about the Rules useful? Can it be improved? If so, how?

(a) Should the Commission consider consumer education or other measures to help non-English-speaking consumers obtain the information that must be disclosed under the Textile Act and Rules?

(b) Should the Commission print copies of consumer education materials, or is a pdf at *http://www.business.ftc.gov* sufficient for your needs?

(21) Regarding the Textile Act requirement in 15 U.S.C. 70b(b)(3) that businesses identify themselves on labels using either their names or identifiers issued by the FTC, what are the benefits and costs of allowing businesses to use alternative identifiers, such as numbers issued by other nations? Provide any evidence supporting your position.

(22) To what extent do retailers obtain valid separate or continuing guarantees that comply with the requirements of the Textile Act and Rules, *i.e.* guarantees signed by a person residing

in the United States and, in the case of continuing guarantees, signed under the penalty of perjury?

(a) Do retailers who obtain such guarantees obtain them for all, most, some, or few of the textile products they sell?

(b) Why do retailers decline to obtain such guarantees?

(c) Have changes in technology, such as the use of electronic documents, affected the ability of retailers to obtain valid separate or continuing guarantees? If so, why and how? If not, why not?

(d) Provide any evidence concerning the extent to which retailers obtain such guarantees and the reasons why retailers decline to obtain them.

(23) What proportion of textile products sold in the U.S. are imported? What proportion of imported products are imported directly by retailers? What proportion are imported by businesses located in the United States for resale or distribution to retailers? How have these proportions changed since the Textile Act and Rules became effective?

(a) Have changes in the extent or manner in which textile products are imported affected the ability of retailers to obtain valid separate or continuing guarantees? If so, does the ability of retailers to obtain such guarantees differ depending on whether the textile products are imported directly by retailers versus imported by businesses for resale or distribution to retailers?

(b) Provide any evidence concerning the costs of obtaining valid guarantees for imported textile products and the impact of such costs on the ability of retailers to obtain valid guarantees.

(c) Do changes in the extent or manner in which textile products are imported indicate that the Textile Act and Rules should be modified? If so, why and how? If not, why not?

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 3, 2012. Write ''Textile Rules, 16 CFR Part 303, Project No. P948404'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site. Because your comment will be made public, you are solely responsible for making sure that your comment doesn't include any sensitive personal information, such as anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment doesn't include any sensitive health information, like medical records or other individually-identifiable health information. In addition, don't include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, don't include competitively-sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you must follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[15] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/textilerulesanpr* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Textile Rules, 16 CFR Part 303, Project No. P948404'' on your comment and on the envelope and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex G), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before January 3, 2012. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

[15] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

List of Subjects in 16 CFR Part 303

Advertising, Labeling, Recordkeeping, Textile fiber products.

Authority: 15 U.S.C. 70 *et seq.*

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2011–28631 Filed 11–4–11; 8:45 am]

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DEPARTMENT OF STATE

22 CFR Part 121

RIN 1400–AC96

[Public Notice: [7673]]

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VIII

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category VIII (aircraft and related articles) of the U.S. Munitions List (USML) to describe more precisely the military aircraft and related defense articles warranting control on the USML.

DATES: The Department of State will accept comments on this proposed rule until December 22, 2011.

ADDRESSES: Interested parties may submit comments within 45 days of the date of publication by one of the following methods:

- E-mail: *DDTCResponseTeam@state.gov* with the subject line, ''ITAR Amendments—Category VIII.
- Internet: At *http://www.regulations.gov,* search for this notice by using this rule's RIN (1400–AC96).

Comments received after that date will be considered if feasible, but consideration cannot be assured. All comments (including any personally identifying information or information for which a claim of confidentiality is

asserted in those comments or their transmittal emails) will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls Web site at *http://www.pmddtc.state.gov.* Parties who wish to comment anonymously may do so by submitting their comments via *http://www.regulations.gov,* leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via *http://www.regulations.gov* are immediately available for public inspection.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). The items subject to the jurisdiction of the ITAR, i.e., ''defense articles,'' are identified on the ITAR's U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (''EAR,'' 15 CFR parts 730–774, which includes the Commerce Control List in part 774), administered by the Bureau of Industry and Security (BIS), U.S. Department of Commerce. Both the ITAR and the EAR impose license requirements on exports and reexports. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other set of regulations are subject to the EAR.

Export Control Reform Update

The Departments of State and Commerce described in their respective Advanced Notices of Proposed Rulemaking (ANPRM) in December 2010 the Administration's plan to make the USML and the CCL positive, tiered, and aligned so that eventually they can be combined into a single control list (see ''Commerce Control List: Revising Descriptions of Items and Foreign Availability,'' 75 FR 76664 (Dec. 9, 2010) and ''Revision to the United States Munitions List,'' 75 FR 76935 (Dec. 10, 2010)). The notices also called for the establishment of a ''bright line'' between the USML and the CCL to reduce government and industry uncertainty regarding export jurisdiction by clarifying whether particular items are subject to the jurisdiction of the ITAR or the EAR. While these remain the Administration's ultimate Export Control Reform objectives, their concurrent implementation would be problematic in the near term. In order to more quickly reach the national security objectives of greater interoperability with our allies, enhancing our defense industrial base, and permitting the U.S. Government to focus its resources on controlling and monitoring the export and reexport of more significant items to destinations, end uses, and end users of greater concern than our NATO and other multi-regime partners, the Administration has decided, as an interim step, to propose and implement revisions to both the USML and the CCL that are more positive, but not yet tiered.

Specifically, based in part on a review of the comments received in response to the December 2010 notices, the Administration has determined that fundamentally altering the structure of the USML by tiering and aligning them on a category-by-category basis would significantly disrupt the export control compliance systems and procedures of exporters and reexporters. For example, until the entire USML was revised and became final, some USML categories would follow the legacy numbering and control structures while the newly revised categories would follow a completely different numbering structure. In order to allow for the national security benefits to flow from re-aligning the jurisdictional status of defense articles that no longer warrant control on the USML on a category-by-category basis while minimizing the impact on exporters' internal control and jurisdictional and classification marking systems, the Administration plans to proceed with building positive lists now and afterward return to structural changes.

Revision of Category VIII

This proposed rule revises USML Category VIII, covering aircraft and related articles, to establish a clearer line between the USML and the CCL regarding controls over military aircraft and related articles. The proposed revision narrows the types of aircraft and related items controlled on the USML to only those that warrant control under the stringent requirements of the Arms Export Control Act. Changes include moving similar articles currently controlled in multiple categories into a single category or subcategory (e.g., inertial navigations systems for aircraft formerly controlled under Category VIII(e) will likely be moved to controls either in Category XII or the CCL in future proposed rules and, as noted in proposed Category VIII(b), gas turbine engines for articles controlled in this category will likely be included in proposed Category XIX, which will be the subject of a separate notice). Other former Category VIII subcategories have been ''reserved'' because the Department is proposing to change the jurisdictional status of the items covered therein so that they would become subject to the EAR, most likely under ECCN 9A610 or 9A619.

This proposed rule also revises § 121.3 to more clearly define ''aircraft'' for purposes of the revised USML Category VIII.

The most significant aspect of this more positive, but not yet tiered, proposed USML category is that it does not contain controls on all generic parts, components, accessories, and attachments that are specifically designed or modified for a defense article, regardless of their significance to maintaining a military advantage for the United States. Rather, it contains, with one principal exception, a positive list of specific types of parts, components, accessories, and attachments that continue to warrant control on the USML. The exception pertains to parts, components, accessories, and attachments ''specially designed'' for the following U.S.-origin aircraft that have low observable features or characteristics: B–1B, B–2, F–15SE, F/A18E/F/G, F–22, F–35 (and variants thereof), F–117, or United States Government technology demonstrators.

All other parts, components, accessories, and attachments ''specially designed'' for a military aircraft and other articles now subject to USML Category VIII would become subject to the new 600 series controls in Category 9 of the CCL to be published separately by the Department of Commerce. The Administration has also proposed revisions to the jurisdictional status of certain militarily less significant end items that do not warrant USML control, but the primary impact of this proposed change will be with respect to current USML controls on parts, components, accessories, and attachments that no longer warrant USML control.

Definition for Specially Designed

Although one of the goals of the export control reform initiative is to describe USML controls without using design intent criteria, a few of the controls in the proposed revision nonetheless use the term ''specially designed.'' It is, therefore, necessary for the Department to define the term. Two definitions have been proposed to date.

The Department first provided a draft definition for ''specially designed'' in the December 2010 ANPRM (75 FR 76935) and noted the term would be used minimally in the USML, and then only to remain consistent with the Wassenaar Arrangement or other

multilateral regime obligation or when no other reasonable option exists to describe the control without using the term. The draft definition provided at that time is as follows: ''For the purposes of this Subchapter, the term ''specially designed'' means that the end-item, equipment, accessory, attachment, system, component, or part (see ITAR § 121.8) has properties that (i) distinguish it for certain predetermined purposes, (ii) are directly related to the functioning of a defense article, and (iii) are used exclusively or predominantly in or with a defense article identified on the USML.''

The Department of Commerce subsequently published on July 15, 2011, for public comment, the Administration's proposed definition of ''specially designed'' that would be common to the CCL and the USML. The public provided more than 40 comments on that proposed definition on or before the September 13 deadline for comments. The Departments of State, Commerce, and Defense are now reviewing those comments and related issues, and the Departments of State and Commerce plan to publish for public comment another proposed rule on a definition of ''specially designed'' that would be common to the USML and the CCL. For the purpose of evaluation of this proposed rule, reviewers should use the definition provided in the December 2010 ANPRM.

Request for Comments

As the U.S. Government works through the proposed revisions to the USML, some solutions have been adopted that were determined to be the best of available options. With the thought that multiple perspectives would be beneficial to the USML revision process, the Department welcomes the assistance of users of the lists and requests input on the following: (1) A key goal of this rulemaking is to ensure the USML and the CCL together control all the items that meet Wassenaar Arrangement commitments embodied in Munitions List Category 10 (ML 10). To that end, the public is asked to identify any potential lack of coverage brought about by the proposed rules for Category VIII contained in this FRN and the new Category 9 ECCNs published separately by the Department of Commerce when reviewed together.

(2) While many of the aircraft controlled in paragraph (a) of Category VIII are defined based on objective parameters, some are not. For example, unmanned aerial vehicles controlled under (a)(6) are simply described as ''military.'' This is to differentiate those unmanned aerial vehicles currently controlled under Category VIII from those currently controlled, and will remain so controlled, under ECCN 9A012. The public is asked to provide input on regulatory language that would control those with an objective description that precludes removal from the USML and does not inadvertently designate as ''defense articles'' aircraft currently subject to the EAR.

Regulatory Analysis and Notices

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from § 553 (Rulemaking) and § 554 (Adjudications) of the Administrative Procedure Act. Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 45-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function. As noted above, and also without prejudice to the Department position that this rulemaking is not subject to the APA, the Department previously published a related Advance Notice of Proposed Rulemaking (RIN 1400–AC78), and accepted comments for 60 days.

Regulatory Flexibility Act

Since this proposed amendment is not subject to 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This proposed amendment does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This proposed amendment will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this proposed amendment.

Executive Order 12866

The Department is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules governing the conduct of this function are exempt from the requirements of Executive Order 12866. However, the Department has reviewed the proposed rule to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Order.

Executive Order 12988

The Department of State has reviewed the proposed amendment in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirement of Executive Order 13175 does not apply to this rulemaking.

Executive Order 13563

The Department of State has considered this rule in light of Executive Order 13563, dated January 18, 2011, and affirms that this regulation is consistent with the guidance therein.

Paperwork Reduction Act

This proposed amendment does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in Parts 120 and 121

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, parts 120 and 121 are proposed to be amended as follows:

PART 120—PURPOSE AND DEFINITIONS

1. Section Contents is revised to read as follows:

* * * * *

120.33–120.36 [Reserved]
120.37 Foreign ownership and foreign control.
120.38 [Reserved]
120.39 Regular employee.
120.40 [Reserved]

PART 121—THE UNITED STATES MUNITIONS LIST

2. The authority citation for part 121 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920.

3. Section 121.1 is amended by revising U.S. Munitions List Category VIII to read as follows:

§ 121.1 General. The United States Munitions List.

* * * * *

VIII—Aircraft and Related Articles

(a) Aircraft (see § 121.3 of this subchapter) as follows:

*(1) Bombers;

*(2) Fighters, fighter bombers, and fixed-wing attack aircraft;

*(3) Jet-powered trainers used to train pilots for fighter, attack, or bomber aircraft;

*(4) Attack helicopters;

*(5) Unarmed military unmanned aerial vehicles (UAVs);

*(6) Armed unmanned aerial vehicles;

*(7) Military intelligence, surveillance, and reconnaissance aircraft;

*(8) Electronic warfare, airborne warning and control aircraft;

(9) Air refueling aircraft and Strategic airlift aircraft;

(10) Target drones;

(11) Aircraft equipped with any mission systems controlled under this subchapter; or

(12) Aircraft capable of being refueled in flight including hover-in-flight refueling (HIFR).

(b) [Reserved—for items formerly controlled under this subcategory see Category XIX and an ECCN to be determined]

(c) [Reserved]

(d) Launching and recovery equipment ''specially designed'' for defense articles described in paragraph (a) of this category.

(e) [Reserved]

(f) Developmental aircraft and ''specially designed'' parts, components, accessories, and attachments therefor developed under a contract with the U.S. Department of Defense.

(g) [Reserved]

(h) Aircraft components, parts, accessories, attachments, and associated equipment as follows:

(1) Components, parts, accessories, attachments, and equipment ''specially designed'' for the following U.S.-origin aircraft: B–1B, B–2, F–15SE, F/A18E/F/G, F–22, F–35 (and variants thereof), F–117, or United States Government technology demonstrators. Components, parts, accessories, attachments, and equipment of the F–15SE, and F/A–18 E/F/G that are common to earlier models of these aircraft, unless listed below, are subject to the jurisdiction of the Export Administration Regulations;

(2) Face gear gearboxes, split-torque gearboxes, variable speed gearboxes, synchronization shafts, interconnecting drive shafts, and gearboxes with internal pitch line velocities exceeding 15,000 feet per minute and parts and components ''specially designed'' therefor;

(3) Tail boom, stabilator and automatic rotor blade folding systems and parts and components ''specially designed'' therefor;

(4) Aircraft wing folding systems and parts and components ''specially designed'' therefor;

(5) Tail hooks and arresting gear and parts and components ''specially designed'' therefor;

(6) Bomb racks, missile launchers, missile rails, weapon pylons, pylon-to-launcher adapters, UAV launching systems, and external stores support systems and parts and components ''specially designed'' therefor;

(7) Damage/failure-adaptive flight control systems;

(8) Threat-adaptive autonomous flight control systems;

(9) Non-surface-based flight control systems and effectors, e.g., thrust vectoring from gas ports other than main engine thrust vector, ''specially designed'' for aircraft;

(10) Radar altimeters with output power management or signal modulation (i.e., frequency hopping, chirping, direct sequence-spectrum spreading) LPI (low probability of intercept) capabilities;

(11) Air-to-air refueling systems and hover-in-flight refueling (HIFR) systems and parts and components ''specially designed'' therefor;

(12) UAV flight control systems and vehicle management systems with swarming capability, i.e., UAVs interact with each other to avoid collisions and stay together, or, if weaponized, coordinate targeting;

(13) Aircraft lithium-ion batteries that provide 28 VDC or 270 VDC;

(14) Lift fans, clutches, and roll posts for short take-off, vertical landing (STOVL) aircraft and parts and components ''specially designed'' for such lift fans and roll posts;

(15) Helmet Mounted Cueing Systems, Joint Helmet Mounted Cueing Systems (JHMCS), Helmet Mounted Displays, Display and Sight Helmets (DASH), and variants thereof;

(16) Fire control computers, mission computers, vehicle management computers, integrated core processers, stores management systems, armaments control processors, aircraft-weapon interface units and computers (e.g., AGM–88 HARM Aircraft Launcher Interface Computer (ALIC)) ''specially designed'' for aircraft;

(17) Radomes ''specially designed'' for operation in multiple or nonadjacent radar bands or designed to withstand a combined thermal shock greater than 4.184×10^6 J/m^2 accompanied by a peak overpressure of greater than 50 kPa;

(18) Drive systems and flight control systems ''specially designed'' to function after impact of a 7.62 mm or larger projectile; or

(19) Any component, part, accessory, attachment, equipment, or system that:

(i) is classified;

(ii) contains classified software;

(iii) is manufactured using classified production data; or

(iv) is being developed using classified information.

''Classified'' in this subcategory means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government.

(i) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (h) of this category. (See § 125.4 of this subchapter for exemptions.)

* * * * *

4. Section 121.3 is revised to read as follows:

§ 121.3 Aircraft and related articles.

(a) In Category VIII, except as described in (b) below, ''aircraft'' means

developmental, production, or inventory aircraft that:

(1) Are U.S.-origin aircraft that bear an original military designation of A, B, E, F, K, M, P, R or S;

(2) Are foreign-origin aircraft ''specially designed'' to provide functions equivalent to those of the aircraft listed in (a)(1) of this section;

(3) Are armed or are ''specially designed'' to be used as a platform to deliver munitions or otherwise destroy targets (e.g., firing lasers, launching rockets, firing missiles, dropping bombs, or strafing);

(4) Are strategic airlift aircraft capable of airlifting payloads over 35,000 lbs to ranges over 2,000 nm without being refueled in-flight into short or unimproved airfields;

(5) Are capable of being refueled in-flight; or

(6) Incorporate any ''mission systems'' controlled under this subchapter. ''Mission systems'' are defined as ''systems'' (see § 121.8(g) of this subchapter) that are defense articles that perform specific military functions beyond airworthiness, such as by providing military communication, radar, active missile counter measures, target designation, surveillance, or sensor capabilities.

(b) Aircraft ''specially designed'' for military applications that are not identified in (a) of this section are subject to the EAR under an ECCN to be determined, including any unarmed military aircraft, regardless of origin or designation, manufactured prior to 1956 and unmodified since manufacture. Modifications made to incorporate safety of flight features or other FAA or NTSB modifications such as transponders and air data recorders are considered ''unmodified'' for the purposes of this subparagraph.

Dated: October 28, 2011.

Ellen O. Tauscher,

Under Secretary, Arms Control and International Security, Department of State.

[FR Doc. 2011–28502 Filed 11–4–11; 8:45 am]

BILLING CODE 4710–25–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0773; FRL- 9487–7]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Revision to Nitrogen Oxides Budget Trading Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia that revises regulatory language that inadvertently ended its nitrogen oxides (NO_X) budget at the end of the 2008 ozone season. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by December 7, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2011–0773 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: fernandez.cristina@epa.gov*

C. *Mail:* EPA–R03–OAR–2011–0773, Cristina Fernandez, Associate Director, Office of Air Quality Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2011–0773. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814–2308, or by email at *powers.marilyn@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule approving Virginia's revision to its NOx Budget Trading program and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: October 25, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2011–28639 Filed 11–4–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0854; FRL–9488–1]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Adoption of the Liberty-Clairton Nonattainment Area 1997 Fine Particulate Matter National Ambient Air Quality Standard Attainment Demonstration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve, with one condition, State Implementation Plan (SIP) revisions submitted by the Pennsylvania Department of Environmental Protection (PADEP) on June 17, 2011. These revisions include the 1997 fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) attainment plan for the Liberty-Clairton nonattainment area (Liberty-Clairton Area) including a request for EPA to make a determination that the appropriate attainment deadline for this nonattainment area is April 5, 2015. EPA is proposing to approve the attainment plan for the Liberty-Clairton Area that includes the emissions inventories, the reasonably available control measures/reasonably available control technology (RACM/RACT), reasonable further progress (RFP), and contingency measures portions of the attainment demonstration, and the transportation conformity motor vehicle emissions budgets (MVEBs) that demonstrate attainment of the 1997 $PM_{2.5}$ NAAQS. EPA is proposing to conditionally approve the air quality modeling submitted to demonstrate attainment of the 1997 $PM_{2.5}$ NAAQS. In order for EPA to fully approve the modeling analysis, PADEP must update the modeling to ensure that the modeling results in the demonstration continue to be valid, considering the reductions from the Cross State Air Pollution Rule (CSAPR) rule that will replace the Clean Air Interstate Rule (CAIR) in 2012, and must submit the revised modeling to EPA within one year after the final conditional approval. EPA is also proposing to determine that the attainment date for the Liberty-Clairton Area is April 5, 2015.

These revisions also add the definition of $PM_{2.5}$, the 1997 annual $PM_{2.5}$ NAAQS of 15 micrograms per cubic meter (μg/m³), the 2006 24-hour NAAQS of 35 μg/m³ and the related references to the list of criteria pollutant standards in the Allegheny County Department of Health (ACHD) regulations. EPA is proposing to approve the addition of the definition of $PM_{2.5}$ and inclusion of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS into the ACHD regulations. These actions are being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before December 7, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2011–0854 by one of the following methods:

A. http://*www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2011–0854, Cristina Fernandez, Associate Director, Office of Air Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Dockets normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2011–0854. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Pennsylvania Department of Environmental Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105 and the Allegheny County Health Department, Bureau of Environmental Quality, Division of Air Quality, 301 39th Street, Pittsburgh, Pennsylvania 15201.

FOR FURTHER INFORMATION CONTACT: Jacqueline Lewis at (215) 814–2037 or by email at *lewis.jacqueline@epa.gov*, or Marilyn Powers at (215) 814–2308, or by email at *powers.marilyn@epa.gov*.

SUPPLEMENTARY INFORMATION: On June 17, 2011, PADEP submitted a revision to the Allegheny County portion of the Pennsylvania SIP. The SIP revision includes an attainment demonstration and base-year inventory for the Liberty-Clairton Area developed by ACHD, which includes an analysis of RACM/RACT, RFP, contingency measures to be implemented if violations occur after attainment or if RFP requirements are not met, and MVEBs for purposes of transportation conformity. In addition, the SIP submittal includes amendments to Allegheny County regulations that adopt the air quality standards and associated definitions necessary to implement the 1997 and 2006 $PM_{2.5}$ NAAQS. Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

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I. What action is EPA proposing to take?

EPA is proposing to approve, with one exception, Pennsylvania's SIP revisions submitted to EPA on June 17, 2011 for the purpose of demonstrating attainment of the 1997 $PM_{2.5}$ NAAQS for the Liberty-Clairton Area. EPA proposes to fully approve the attainment demonstration for the Liberty-Clairton Area that includes the base year emissions inventories, RACM/RACT analysis, RFP plan, contingency measures, and MVEBs that meet the applicable requirements of the CAA and the $PM_{2.5}$ Implementation Rule in 40 CFR part 41, subpart Z. EPA proposes to conditionally approve the air quality modeling analysis portion of the attainment demonstration because the analysis relies on reductions from the CAIR, which was remanded and will be replaced by CSAPR in 2012. EPA proposes to determine that the attainment date for the 1997 $PM_{2.5}$ NAAQS in the Liberty-Clairton Area is April 5, 2015.

EPA is also proposing to approve amendments to ACHD regulations that add the definition of $PM_{2.5}$ and the level of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. Specifically, EPA proposes to approve the addition of the 1997 annual $PM_{2.5}$ standard of 15 $\mu g/m^3$, the 2006 24-hour $PM_{2.5}$ standard of 35 $\mu g/m^3$, the related references to the list of standards in ACHD Article XXI Section 2101.10, and the new definition of $PM_{2.5}$ to ACHD Article XXI Section 2101.20.

II. What is the background for EPA's proposed actions?

On July 18, 1997 (62 FR 36852), EPA established new NAAQS for $PM_{2.5}$, particulate matter with a diameter of 2.5 microns or less, including an annual standard of 15.0 $\mu g/m^3$ based on a three year average of annual mean $PM_{2.5}$ concentrations and a 24-hour (daily) standard of 65 $\mu g/m^3$ based on a three year average of the 98th percentile of 24-hour concentrations. See, 40 CFR 50.7. EPA established these standards after considering substantial evidence from numerous health studies demonstrating that serious health effects are associated with exposures to $PM_{2.5}$ concentrations above the levels of these standards.

Epidemiological studies have shown statistically significant correlations between elevated $PM_{2.5}$ levels and premature mortality. Other important health effects associated with $PM_{2.5}$ exposure include aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions, emergency room visits, absences from school or work, and restricted activity days), changes in lung function and increased respiratory symptoms, as well as new evidence for more subtle indicators of cardiovascular health. Individuals particularly sensitive to $PM_{2.5}$ exposure include older adults, people with heart and lung disease, and children. See, EPA, *Air Quality Criteria for Particulate Matter,* No. EPA/600/P–99/002aF and EPA/600/P–99/002bF, October 2004. $PM_{2.5}$ can be emitted directly into the atmosphere as a solid or liquid particle (primary $PM_{2.5}$ or direct $PM_{2.5}$) or can be formed in the atmosphere as a result of various chemical reactions from precursor emissions of nitrogen oxides (NO_x), sulfur oxides (SO_2), volatile organic compounds (VOC), and ammonia (NH_3). (72 FR 20586, 20589, April 25, 2007).

Following promulgation of a new or revised NAAQS, EPA is required by the CAA section 107(d) to designate areas throughout the nation as attaining or not attaining the NAAQS. On January 5, 2005 (70 FR 944), EPA published initial air quality designations for the 1997 $PM_{2.5}$ NAAQS, using air quality monitoring data for the three-year periods of 2001–2003 or 2002–2004. These designations became effective on April 5, 2005. On November 13, 2009 (74 FR 58688), EPA revised the existing designation tables in part 81 to clarify that the 1997 designations were for both the annual $PM_{2.5}$ NAAQS and the 24-hour $PM_{2.5}$ NAAQS.

On October 17, 2006 (71 FR 61144), EPA strengthened the 24-hour $PM_{2.5}$ NAAQS by lowering the level to 35 $\mu g/m^3$. At the same time, it retained the level of the annual $PM_{2.5}$ standard at 15.0 g/m^3. On November 13, 2009 (74 FR 58688), EPA designated areas, including the Liberty-Clairton Area, with respect to the revised 24-hour NAAQS. Pennsylvania is now required to submit an attainment plan for the 24-hour standard no later than three years after the effective date of the designation, that is, no later than December 14, 2012. In this notice, all references to the $PM_{2.5}$ NAAQS are to the 1997 24-hour $PM_{2.5}$ standard of 65 $\mu g/m^3$ and annual standard of 15 $\mu g/m^3$, as codified in 40 CFR 50.7.

EPA designated the Liberty-Clairton Area nonattainment for both the 1997 annual and 24-hour $PM_{2.5}$ standards. See, 40 CFR 81.305. The Liberty-Clairton Area is located within the Pittsburgh Beaver Valley Area, as a separate nonattainment area. The Liberty-Clairton Area was designated as a separate distinctively local-source impacted nonattainment area because the combination of emissions from the local sources in a narrow river valley creates a local air quality problem uniquely different from the remainder of the Pittsburgh-Beaver Valley Area. The Liberty-Clairton Area is home to 25,000 people about 1% the population of the Pittsburgh Metropolitan Statistical Area (MSA) and includes the boroughs of Glassport, Liberty, Lincoln, Port Vue, and the City of Clairton.

EPA is implementing the 1997 $PM_{2.5}$ NAAQS under Title 1, Part D, subpart 1 of the CAA, which includes section 172, ''Nonattainment plan provisions.'' Section 172(a)(2) requires that a $PM_{2.5}$ nonattainment area attain the NAAQS ''as expeditiously as practicable,'' but no later than five years from the date of the area's designation as nonattainment. This section also allows EPA to grant up to a five-year extension of an area's attainment date based on the severity of the area's nonattainment and the availability and feasibility of controls. EPA designated the Liberty-Clairton Area as nonattainment for the 1997 $PM_{2.5}$ NAAQS effective April 5, 2005, and thus the applicable attainment date is either: (a) No later than April 5, 2010, or (b) no later than April 5, 2015 if EPA grant a full five-year extension. Section 172(c) contains the general statutory planning requirements applicable to all nonattainment areas, including the requirements for emissions inventories, RACM/RACT, attainment demonstrations, RFP demonstrations, and contingency measures.

On April 25, 2007, EPA issued the Clean Air Fine Particle Implementation Rule for the 1997 $PM_{2.5}$ NAAQS. See, 72 FR 20586, codified at 40 CFR part 51, subpart Z ($PM_{2.5}$ Implementation Rule). The $PM_{2.5}$ Implementation Rule and its preamble address the statutory planning requirements for emissions inventories, RACM/RACT, attainment demonstrations including air quality modeling requirements, RFP demonstrations, and contingency measures. This rule also addresses other matters such as which $PM_{2.5}$ precursors must be addressed by the state in its attainment SIP and applicable attainment dates.[1] We discuss each of

[1] In June 2007, a petition to the EPA Administrator was filed on behalf of several public health and environmental groups requesting reconsideration of four provisions in the $PM_{2.5}$ Implementation Rule. See Earthjustice, Petition for Reconsideration, ''In the Matter of Final Clean Air Fine Particle Implementation Rule,'' June 25, 2007. These provisions are (1) the presumption that

these CAA and regulatory requirements for $PM_{2.5}$ attainment plan in more detail below.

III. What is EPA's analysis of the Liberty-Clairton Attainment Plan SIP Revision?

A. Attainment Demonstration

CAA section 172 requires a state to submit a plan for each of its nonattainment areas that demonstrates attainment of the applicable ambient air quality standard as expeditiously as practicable, but no later than the specified attainment date. Under the $PM_{2.5}$ Implementation Rule, this demonstration should consist of four parts:

1. Technical analyses that locate, identify, and quantify sources of emissions that are contributing to violations of the $PM_{2.5}$ NAAQS;

2. Analyses of future year emissions reductions and air quality improvement resulting from already-adopted national, state, and local programs and from potential new state and local measures to meet the RACM/RACT and RFP requirements in the area;

3. Adopted emissions reduction measures with schedules for implementation; and

4. Contingency measures required under section 172(c)(9) of the CAA. See, 40 CFR 51.1007 and 72 FR 20586 at 20605.

1. Pollutants Addressed

EPA recognizes NO_X, SO_2, VOC, and NH_3 as the main precursor gases associated with the formation of secondary $PM_{2.5}$ in the ambient air. These gas-phase $PM_{2.5}$ precursors undergo chemical reactions in the atmosphere to form secondary particulate matter. Formation of secondary $PM_{2.5}$ depends on numerous factors including the concentrations of precursors; the concentrations of other gaseous reactive species; atmospheric conditions including solar radiation, temperature, and relative humidity; and the interactions of precursors with preexisting particles and with cloud or fog droplets. See, 72 FR 20586 at 20589.

As discussed previously, a state must submit emissions inventories for each of the four $PM_{2.5}$ precursor pollutants. See, 72 FR 20586 at 20589 and 40 CFR 51.1008(a)(1). However, the overall contribution of different precursors to $PM_{2.5}$ formation and the effectiveness of alternative potential control measures will vary by area. Thus, the precursors that a state should regulate to attain the $PM_{2.5}$ NAAQS can also vary to some extent from area to area. See, 72 FR 20586 at 20589. In the $PM_{2.5}$ Implementation Rule, EPA did not require that all potential $PM_{2.5}$ precursors must be controlled in each specific nonattainment area. See, 72 FR 20586 at 20589. Instead, for reasons explained in the rule's preamble, a state must evaluate control measures for sources of SO_2 in addition to sources of direct $PM_{2.5}$ in all nonattainment areas. See, 40 CFR 51.1002(c) and (c)(1). A state must also evaluate control measures for sources of NO_X unless the state and/or EPA determine that control of NO_X emissions would not significantly reduce $PM_{2.5}$ concentrations in the specific nonattainment area. See, 40 CFR 51.1002(c)(2). In contrast, EPA has determined in the $PM_{2.5}$ Implementation Rule that a state does not need to address controls for sources of VOC and NH_3 unless the state and/or EPA make a technical demonstration that such controls would significantly contribute to reducing $PM_{2.5}$ concentrations in the specific nonattainment area at issue. See, 40 CFR 51.1002(c)(3) and (4). Such a demonstration is required ''if the administrative record related to development of its SIP shows that the presumption is not technically justified for that area.'' See, 40 CFR 51.1002(c)(5). ''Significantly contributes'' in this context means that a significant reduction in emissions of the precursor from sources in the area would be projected to provide a significant reduction in $PM_{2.5}$ concentrations in the area. See, 72 FR 20586 at 20590. Although EPA did not establish a quantitative test for determining what constitutes a significant change, EPA noted that even relatively small reductions in $PM_{2.5}$ levels are estimated to result in worthwhile public health benefits.

EPA further explained that a technical demonstration to reverse the presumption for NO_X, VOC, or NH_3 in any area could consider the emissions inventory, speciation data, modeling information, or other special studies such as monitoring of additional compounds, receptor modeling, or special monitoring studies. See, 72 FR 20586 at 20596–20597. These factors could indicate that the emissions or ambient concentration contributions of a precursor, or the sensitivity of ambient concentrations to changes in precursor emissions, differs for a specific nonattainment area from the presumption EPA established for that precursor in the $PM_{2.5}$ Implementation Rule.

ACHD submitted 2002 baseline inventories for each of the four precursor emissions and for direct $PM_{2.5}$ emissions within the Liberty-Clairton Area. Its submission did not specifically discuss the presumptions in the $PM_{2.5}$ Implementation Rule, however its discussion of the emissions inventory and control strategy implicitly showed that ACHD did not reverse the presumptions for NO_X, VOC or NH_3. Therefore, evaluation of control measures for VOC and/or NH_3 was not considered, while NO_X was considered, and, in accordance with policies described in the $PM_{2.5}$ Implementation Rule, the Liberty-Clairton Area $PM_{2.5}$ attainment demonstration evaluated emissions of direct $PM_{2.5}$, SO_2, and NO_X.

2. Emissions Inventories

CAA section 172(c)(3) requires a state to submit a plan provision that includes a ''comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant.'' The $PM_{2.5}$ Implementation Rule requires a state to include direct $PM_{2.5}$ emissions and emissions of all $PM_{2.5}$ precursors in this inventory, even if it has determined that control of any of these precursors is not necessary for expeditious attainment. See, 40 CFR 51.1008(a)(1) and 72 FR 20586 at 20648. Direct $PM_{2.5}$ includes condensable particulate matter. See, 40 CFR 51.1000. The $PM_{2.5}$ precursors are NO_X, SO_2, VOC, and NH_3. The inventories should meet the data reporting requirements of EPA's Air Emissions Reporting Requirements (AERR) (71 FR 69, January 3, 2006) and include any additional inventory information needed to support the SIP's attainment demonstration and RFP demonstration. See, 40 CFR 51.1008(a)(1) and (2). Baseline emissions inventories are required for the attainment demonstration and for meeting RFP requirements. As

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compliance with the Clean Air Interstate Rule satisfies the NO_X and SO_2 RACT requirements for electric generating units; (2) the deferral of the requirement to establish emission limits for condensable particulate matter (CPM) until January 1, 2011; (3) revisions to the criteria for analyzing the economic feasibility of RACT; and (4) the use of out-of-area emissions reductions to demonstrate RFP. These provisions are found in the $PM_{2.5}$ Implementation Rule and preamble at 72 FR 20586 at 20623–20628, 40 CFR section 51.1002(c), 72 FR 20586, 20619–20620 and 20636, respectively. On May 13, 2010, EPA granted the petition with respect to the fourth issue. Letter, Gina McCarthy, EPA, to David Baron and Paul Cort, Earthjustice, May 13, 2010. On April 25, 2011, EPA granted the petition with respect to the first and third issues but denied the petition with respect to the second issue given that the deferral period for CPM emissions limits had already ended. Letter, Lisa P. Jackson, EPA, to Paul Cort, Earthjustice, April 25, 2011. EPA intends to publish a **Federal Register** notice that will announce the granting of the latter petition with respect to certain issues and to initiate a notice and comment process to consider proposed changes to the 2007 $PM_{2.5}$ Implementation Rule.

determined on the date of designation, the base year for these inventories should be the most recent calendar year for which a complete inventory was required to be submitted to EPA. The emissions inventory for calendar year 2002 or other suitable year should be used for attainment planning and RFP plans for areas initially designated nonattainment for the $PM_{2.5}$ NAAQS in 2005. See, 40 CFR 51.1008(b). EPA has provided additional guidance for $PM_{2.5}$ emissions inventories in the ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter NAAQS and Regional Haze Regulations,'' November 2005 (EPA–454/R–05–001).

The base year and future year baseline planning inventories for direct $PM_{2.5}$ and all $PM_{2.5}$ precursors for the Liberty-Clairton Area were included as part of this submittal. The base year used for the Liberty-Clairton Area SIP was 2002. ACHD developed a point source inventory comprised of emissions for five facilities in the nonattainment area, which included two major sources, two synthetic minor sources, and one minor source. ACHD then made corrections to the point source inventory for these sources to include the addition of condensable PM emissions.

For the 2002 area sources, ACHD provided an inventory that contained estimations of emissions by multiplying an emission factor by some known indicator or activity level for each category at the county level. These estimates were apportioned to the Liberty-Clairton Area based on population counts.

The 2002 Nonroad Mobile Sources emissions inventory was prepared with EPA's NONROAD2005 model. This model estimates fuel consumption and emissions of total hydrocarbons, carbon monoxide, NO_X, SO_2, and PM for all nonroad mobile source categories except aircraft, locomotives, and commercial marine vessels. The National Mobile Inventory Model was used to estimate emissions of NH_3 from sources contained in the NONROAD model. The 2002 Onroad Mobile Sources emissions inventory was prepared using EPA's highway mobile source emissions model MOBILE 6.2.

Table 1 below shows the Liberty-Clairton Area emissions inventory summary for direct $PM_{2.5}$ and $PM_{2.5}$ precursors for the 2002 base year. These emissions represent emissions from sources only within the five-municipality Liberty-Clairton Area, not the larger modeled area.

TABLE 1—BASELINE 2002 EMISSIONS

[Tons/year]

Liberty-Clairton area (2002)	$PM_{2.5}$	SO_2	NO_X	VOC	NH_3
Stationary Point Sources	2201.438	1358.522	5786.190	432.735	299.714
Area Sources	36.506	81.962	80.176	336.467	7.416
Nonroad Sources	23.005	16.170	227.673	119.244	0.078
Mobile Sources	4.918	12.077	283.422	200.841	13.867
Totals	2265.867	1468.731	6377.461	1089.287	321.075

Table 2 below shows the Liberty-Clairton Area emissions inventory summary for direct $PM_{2.5}$ and $PM_{2.5}$ precursors for the 2014 future projected year. Similar to the baseline inventory, these emissions represent sources only within the five municipality Liberty-Clairton Area.

TABLE 2—FUTURE PROJECTED 2014 EMISSIONS

[Tons/year]

Liberty-Clairton area (2014)	$PM_{2.5}$	SO_2	NO_X	VOC	NH_3
Stationary Point Sources	1328.785	1459.146	5282.002	581.492	255.456
Area Sources	35.464	86.464	86.239	307.013	8.176
Nonroad Sources	21.500	3.034	169.006	83.335	0.093
Mobile Sources	2.749	1.409	134.079	98.997	14.367
Totals	1388.498	1550.053	5671.326	1070.837	278.092

3. Control Strategy

To understand the $PM_{2.5}$ problem in the Liberty-Clairton Area, EPA believes it is helpful to explain the unique topographic and meteorologic conditions in the area, as well as the geographic location of this area. The approximately 12 square kilometer area is a subset of Allegheny County, and is surrounded by the Pittsburgh-Beaver Valley nonattainment area (Pittsburgh Area). The Liberty-Clairton Area was designated a separate nonattainment area from the surrounding Pittsburgh Area because, in addition to the regional air quality problem, there is a localized air quality issue caused by local sources and by specific geologic and meteorological features of the area. The $PM_{2.5}$ problem in the Liberty-Clairton Area is compounded by the sharp difference in elevation between the industrial and residential areas as well as large temperature differences between the river valleys and the adjacent hilltops. The high hillsides of the two rivers in the area create a significant river basin with spikes in localized $PM_{2.5}$ concentrations that coincide with temperature inversions. Two of the eight monitors in the combined areas are located within the Liberty-Clairton Area, one in Liberty Borough (Liberty monitor) and one in the city of Clairton (Clairton monitor). On many days the Liberty monitor has readings very similar to those located in the Pittsburgh Area. However, when the regional concentrations rise, the Liberty monitor rises higher than any other site in the region, and after an inversion break, the monitor returns to a level comparable to, and sometimes less than, the concentrations measured at surrounding monitors in the Pittsburgh Area. The occurrence and severity of these high readings at the Liberty monitor, caused by local sources and

features, required that a control strategy for the Liberty-Clairton Area be considered separate from, and in addition to, the control strategy for the larger Pittsburgh Area.

Direct PM from local sources are at the heart of the $PM_{2.5}$ problem in this area, and the control strategy for attainment within the nonattainment area is to reduce emissions of direct $PM_{2.5}$. Other than regional reductions of NO_X and SO_2 within the surrounding Pittsburgh Area, no additional local reductions for these pollutants are necessary for the Liberty-Clairton Area to attain the NAAQS by the attainment date. The monitored NO_X and SO_2 within the Liberty-Clairton Area are representative of the monitored concentrations of these precursors in the larger Pittsburgh Area. The small geographic size of the Liberty-Clairton Area is such that there is insufficient residence time for a local conversion of NO_X and SO_2 to nitrates and sulfates. This is indicated by a lack of sizable difference in the levels monitored at the Liberty monitor with the levels monitored at the Lawrenceville monitor located in Allegheny County, just north of Pittsburgh. Additionally, monitored data shows consistent trends at the Liberty monitor for sulfates and nitrates with those throughout the southwestern part of Pennsylvania, with no outlying concentrations of NO_X and SO_2 at the Liberty monitor. For the above reasons, EPA has determined that it is not practical to rely on local NO_X and SO_2 reductions for purposes of ensuring that the Liberty-Clairton Area will attain the $PM_{2.5}$ NAAQS by the attainment date. While NO_X and SO_2 reductions from within the nonattainment area are not relied upon for the Liberty-Clairton Area to attain the $PM_{2.5}$ standard, EPA recognizes that addressing the control strategy for NO_X and SO_2 in the larger surrounding nonattainment area may result in collateral benefit in the Liberty-Clairton Area; EPA will address control strategies for NO_X and SO_2 in the surrounding nonattainment area when EPA takes action on the Pittsburgh Area attainment demonstration SIP.

With respect to control strategies for direct $PM_{2.5}$, ACHD has already required implementation of stringent control measures for the largest sources of direct $PM_{2.5}$ in the Liberty-Clairton Area, so reducing direct $PM_{2.5}$ further is challenging. The majority of direct $PM_{2.5}$ emissions reductions that the ACHD projects are needed for $PM_{2.5}$ attainment in the Liberty-Clairton Area by 2015 will come from a combination of upgrades and shutdowns of batteries and quench towers at the U.S. Steel Mon Valley Works Clairton (U.S. Steel) and Edgar Thomson Plants in response to a number of previous visible emissions and opacity violations. In accordance with a March 2008 consent order and agreement between ACHD and U.S. Steel, several upgrades and shutdowns have taken place or are required to take place, including:

a. Batteries 7, 8, and 9 were permanently shut down on April 16, 2009. The original date for shut down was December 31, 2012 in the consent order and agreement. The new Battery C will replace the production of Batteries 7, 8, and 9 at significantly lower emissions due to newer and cleaner technology. This project reduces emissions of direct $PM_{2.5}$ by over 200 tons per year at a cost of $500 million.

b. 25 heating walls on Battery 19 will be replaced by October 31, 2012. The battery will meet its opacity limits by December 31, 2012, including, as necessary, implementing an advanced patching plan.

In September 2010, ACHD and U.S. Steel amended the March 2008 consent order and agreement to include the construction of new low emission quench towers for Batteries 13–15 and Batteries 19–20 by December 31, 2013. The new quench towers 5A and 7A will be used as the primary quench towers for Batteries 13–15 and Batteries 19–20, respectively. The current quench towers 5 and 7 will serve as auxiliary quench towers. The new quench towers 5A and 7A will reduce emissions of direct $PM_{2.5}$ by 593 tons per year.

Additional reductions are achieved by a June 2007 ACHD and U.S. Steel consent decree to rebuild the B Battery heating walls, which was to be completed by June 30, 2010, and replacement of 25 heating walls on Battery 19 by October 2012 to meet opacity limits. Table 3 below summarizes the reductions that are relied on in the Liberty-Clairton Area $PM_{2.5}$ attainment plan to demonstrate attainment by April 5, 2015.

TABLE 3—SUMMARY OF REDUCTIONS NEEDED FOR THE LIBERTY-CLAIRTON AREA $PM_{2.5}$ ATTAINMENT DEMONSTRATION

[Tons per year]

	Direct $PM_{2.5}$	NO_X	SO_2
A. 2002 emissions level	2,270.6	229,571.7	587,201.4
B. 2014 attainment target	1,392.6	108,565.5	132,598.7
C. Total reductions needed by 2014 (A minus B)	878.0	121,006.2	454,602.7

The majority of direct $PM_{2.5}$ emissions reductions that the State projects are needed for $PM_{2.5}$ attainment in the Liberty-Clairton Area by 2015 come from the combination of upgrades and shutdowns of batteries and quenches towers at the U.S. Steel Mon Valley Clairton Plant. ACHD included in this table the reductions of $PM_{2.5}$ precursor pollutants NO_X and SO_2 that are achieved by the regional programs that address transported emissions. The NO_X and SO_2 projected reductions shown in this table come from the CAIR regional trading program, and are addressed in the regional modeling discussed below. The sources from which these NO_X and SO_2 emission reductions are achieved are located upwind of the Liberty-Clairton Area in the Pittsburgh Area.

4. RACM/RACT

CAA section 172(c)(1) requires that each attainment plan ''provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology), and shall provide for attainment of the national primary ambient air quality standards.'' EPA defines RACM as measures that a state finds are both reasonably available and contribute to attainment as expeditiously as practicable in its nonattainment area. Thus, what constitutes RACM/RACT in a $PM_{2.5}$ attainment plan is closely tied to that plan's expeditious attainment demonstration. See, 40 CFR 51.1010 and 72 FR 20586 at 20612. States are required to evaluate RACM/RACT for direct $PM_{2.5}$ and all of its attainment plan precursors. See, 40 CFR 51.1002(c).

Consistent with subpart 1 of Part D of the CAA, EPA is requiring a combined approach to RACM and RACT for $PM_{2.5}$ attainment plans. Subpart 1, unlike

subparts 2 and 4, does not identify specific source categories for which EPA must issue control technology documents or guidelines for what constitutes RACT, or identify specific source categories for state and EPA evaluation during attainment plan development. See, 72 FR 20586 at 20610. Rather, under subpart 1, EPA considers RACT to be part of an area's overall RACM obligation. Because of the variable nature of the $PM_{2.5}$ problem in different nonattainment areas, EPA determined not only that states should have flexibility with respect to RACT and RACM controls, but also that in areas needing significant emission reductions to attain the standards, RACT/RACM controls on smaller sources may be necessary to reach attainment as expeditiously as practicable. See, 72 FR 20586 at 20612, 20615. Thus, under the $PM_{2.5}$ Implementation Rule, RACT and RACM are those reasonably available measures that contribute to attainment as expeditiously as practicable in the specific nonattainment area. See, 40 CFR 51.1010 and 72 FR 20586 at 20612.

The $PM_{2.5}$ Implementation Rule requires that attainment plans include the list of measures a state considered and information sufficient to show that the state met all requirements for the determination of what constitutes RACM/RACT in its specific nonattainment area. See, 40 CFR 51.1010. In addition, the rule requires that the state, in determining whether a particular emissions reduction measure or set of measures must be adopted as RACM/RACT, consider the cumulative impact of implementing the available measures and to adopt as RACM/RACT any potential measures that are reasonably available considering technological and economic feasibility if, considered collectively, they would advance the attainment date by one year or more. Any measures that are necessary to meet these requirements which are not already either federally promulgated, part of the state's SIP, or otherwise creditable in SIPs must be submitted in enforceable form as part of a state's attainment plan for the area. See, 72 FR 20586 at 20614.

ACHD undertook a process to identify and evaluate potential reasonably available control measures that could contribute to expeditious attainment of the $PM_{2.5}$ standard for the Liberty-Clairton Area. These RACM/RACT analyses address control measures for sources of direct $PM_{2.5}$ only. The control measures for sources of SO_2 or NO_X were not addressed because, as explained earlier, the area is too small and conditions are not appropriate for SO_2 or NO_X from sources located within the nonattainment area to be able to convert to $PM_{2.5}$. ACHD's RACM/RACT analysis focused on point, area and mobile source controls. To identify potential RACM/RACT in the 12 square kilometer nonattainment area, ACDH's review of potential measures from two major sources (U.S. Steel Clairton Plant and Koppers Industries, Inc. Clairton Plant), and one minor source (Mid Continent Coal and Coke Company) is summarized below.

For the U.S. Steel Clairton Plant, many alternatives were considered for the coke batteries and quench towers. For the Coke batteries, there were very few alternatives were available, since some of the nation's strictest standards are already in place for this facility. Of the alternatives considered, none were considered technically feasible for integration into the process. For the quench towers, among the many alternatives considered were short towers with single baffles, wet low emission quench, coke stabilization quenching process, and Kress indirect cooling system. However, they were all found to be unacceptable due to the cost effectiveness, potential magnitude and timing of emissions reductions and availability of space. For the Koppers Industries Inc. Clairton Plant, alternatives were considered for the tar refining process and the manufacturing of the rod pitch. For both the tar refining process and manufacturing of the rod pitch, the alternatives considered resulted in no additional emissions reductions. For the Mid Continent Coal and Coke Company, the total $PM_{2.5}$ emissions are no more than five tons per year, mostly resulting from unpaved roads. The emission reductions benefit from the implementation of dust suppressants would produce only insignificant emission reductions and would not advance the attainment date by one year or more even if combined with other control measures. After completing its RACM/RACT analysis for stationary, area and mobile sources of direct $PM_{2.5}$, ACHD concluded that no additional reasonable controls are available that would advance the attainment date by one year.

Based on our review of potential RACM/RACT in the Liberty-Clairton Area $PM_{2.5}$ attainment plan, we agree that there are no additional reasonably available control measures that individually, or collectively, would advance attainment of the 1997 $PM_{2.5}$ NAAQS in the Liberty-Clairton nonattainment area by one year or more, and propose to approve the RACM/RACT determination submitted by PADEP.

5. Modeling

The $PM_{2.5}$ Implementation Rule requires states to submit an attainment demonstration based on modeling results. Specifically, 40 CFR 51.1007(a) states that for any area designated as nonattainment for the $PM_{2.5}$ NAAQS, the state must submit an attainment demonstration showing that the area will attain the annual and 24-hour standards as expeditiously as practicable. The demonstration must meet the requirements of 40 CFR part 51 and appendix W of this part and must include inventory data, modeling results, and emission reduction analyses on which the state has based its projected attainment date. The attainment date justified by the demonstration must be consistent with the requirements of 40 CFR 51.1004(a). The modeled strategies must be consistent with requirements in 40 CFR 51.1009 for RFP and in 40 CFR 51.1010 for RACT and RACM. The attainment demonstration and supporting air quality modeling should be consistent with EPA's $PM_{2.5}$ modeling guidance.[2] See also, 72 FR 20586 at 20665.

Air quality modeling is used to establish emissions attainment targets, the combination of emissions of $PM_{2.5}$ and $PM_{2.5}$ precursors that the area can accommodate without exceeding the NAAQS and to assess whether the proposed control strategy will result in attainment of the NAAQS. Air quality modeling is performed for a base year and compared to air quality monitoring data in order to evaluate model performance. Once the performance is determined to be acceptable, future year changes to the emissions inventory are simulated to determine the relationship between emissions reductions and changes in ambient air quality throughout the air basin.

The procedures for modeling $PM_{2.5}$ as part of an attainment SIP are contained in EPA's ''Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for the 8-Hour Ozone and $PM_{2.5}$ NAAQS and Regional Haze.'' This guidance encourages states to take a nine-step approach when preparing a modeling analysis to demonstrate attainment of the $PM_{2.5}$ NAAQS. The nine steps include formulation of a conceptual description of the nonattainment problem, development of a modeling protocol, use of an

[2] EPA's modeling guidance can be found in ''Guideline on Air Quality Models'' in 40 CFR part 51, appendix W and ''Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for the 8–Hour Ozone and $PM_{2.5}$ NAAQS and Regional Haze,'' EPA–454/B–07–002, April 2007.

appropriate model using appropriate meteorological episodes and a modeling domain to establish initial and boundary conditions, generation of meteorological and air quality inputs, generation of emissions inputs, evaluation of the performance of the air quality model, and performance of future year modeling that includes control strategies, followed by application of the attainment test.

ACHD's conceptual description of its $PM_{2.5}$ nonattainment problem is provided in Appendix C (Modeling Protocol) of its attainment SIP. The unique meteorologic and geologic features of the area was also discussed briefly in section A.3 of this notice. Episodes of poor air quality often occur within the Liberty-Clairton Area during periods of strong nocturnal inversions. When this occurs, air dispersion is often minimized, allowing emissions to ''build up'' within the river valleys, and contributing to episodes of poor air quality that leads to high $PM_{2.5}$ design values. Many times, $PM_{2.5}$ concentrations in the Liberty-Clairton Area are significantly higher than concentrations in the nearby city of Pittsburgh. Using source apportionment modeling for the Liberty and Lawrenceville monitors in Allegheny County, ACHD's analysis found that the Liberty monitor's $PM_{2.5}$ concentrations are impacted by regional loading based on similarities in both monitor's speciation data and that sources near the Liberty monitor are responsible for the speciation differences observed between the two monitors.

The Liberty-Clairton $PM_{2.5}$ SIP utilized two components in its attainment demonstration modeling: a regional photochemical grid model and a local scale model with sufficient resolution to examine the impacts of local emission sources. Model results were used in a relative rather than an absolute sense. Following this methodology, the ratio of the model's future to current (baseline) predictions at both of the nonattainment area's $PM_{2.5}$ monitors determines if the controls in the Liberty-Clairton Area are likely to lead to attainment with the 1997 p.m.$_{2.5}$ NAAQS.

The regional modeling demonstration for the Liberty-Clairton Area used the Community Multiscale Air Quality (CMAQ) model. The CMAQ modeling was performed by the Bureau of Air Quality Analysis and Research, New York State Department of Environmental Conservation (DEC) using Mid-Atlantic/Northeast Visibility Union Regional Planning Organization (MANE–VU) inventory with a base year of 2002. Regional controls for SO_2 and NO_X in the MANE–VU inventory were based on the CAIR. Local sources in the Liberty-Clairton Area create steep gradients in $PM_{2.5}$ concentrations than cannot be adequately resolved by the CMAQ model, which uses grid cells that are roughly 12 square kilometers—approximately the total area of the Liberty-Clairton Area. Local scale meteorology is also not well simulated by the CMAQ model due to steep topography within the Liberty-Clairton Area that often contributes to strong temperature inversions and complex flow patterns within the valleys. ACHD's analysis of its $PM_{2.5}$ monitors within Allegheny County showed significant local impacts at the Liberty-Clairton Area. To better simulate the local source impacts within the nonattainment area, ACHD used the California PUFF (CALPUFF) air quality dispersion modeling system.

The CALPUFF modeling system uses CALMET, a diagnostic 3-dimensional meteorological model, and CALPOST, a post processing program. The CALPUFF model, which uses a much finer scale than the regional model, was used to help better resolve local topographic features that influence emission dispersion and address spatial relationships between local sources and the monitors in the Liberty-Clairton Area. The CALPUFF grid spacing for the 150 km regional source analysis domain was one kilometer and 100 meters for the 20 kilometer local scale analysis domain. The CALMET processor was used to recreate some of the more complex atmospheric flows in the Liberty-Clairton Area.

The MANE–VU regional analysis used northeastern United States emissions inventories for all source classifications. The year 2002 was used for the baseline emissions inventory and 2014 for the projected inventory for the Liberty-Clairton Area. Regional projections used on-the-books/on-the-way (OTB/OTW) controls through the 2012 timeframe. Since no additional projections were available at the time, and since Liberty-Clairton controls focus on direct $PM_{2.5}$ emissions, the inventory was limited to direct $PM_{2.5}$ emissions and was developed from both the regional MANE–VU projections for 2012 for precursors and non-point $PM_{2.5}$ emissions in combination with ACHD's local projections for 2014 for stationary point $PM_{2.5}$ emissions. A more detailed inventory, limited to $PM_{2.5}$, was developed by the ACHD for the extended Liberty-Clairton Area as part of its CALPUFF modeling analysis. This inventory was developed from both the MANE–VU inventories and projections, which were based on CAIR, along with ADCH's inventories for stationary point sources.

The monitored attainment test for $PM_{2.5}$ utilizes both $PM_{2.5}$ and individual $PM_{2.5}$ component species. The attainment test for $PM_{2.5}$ is the Speciated Modeled Attainment Test (SMAT). In SMAT, a separate relative response factor (RRF) is calculated for each $PM_{2.5}$ component. These RRF values are then multiplied by the base year concentrations for each monitor within the nonattainment area to determine if an area is projected to attain the NAAQS.

The Liberty-Clairton Area has two $PM_{2.5}$ monitoring sites, the Liberty monitor and the Clairton monitor. Speciation data from the Liberty monitor was used for the Clairton monitor since this site does not collect speciation data. Annual and 24-hour $PM_{2.5}$ concentrations for both the Liberty and Clairton monitors were calculated from the quarterly base-year averaged monitor concentrations and the RRFs calculated from THE CMAQ MODEL and CALPUFF for each $PM_{2.5}$ component. Results for the annual and 24-hour $PM_{2.5}$ NAAQS are summarized in Table 4 which shows that the projected 2014 annual and 24-hour design values for the 1997 $PM_{2.5}$ NAAQS.

TABLE 4—MODELED $PM_{2.5}$ DESIGN VALUES

Monitor	Annual standard		24-Hour standard	
	2014 Projected	1997 NAAQS	2014 Projected	1997 NAAQS
Liberty	14.3 μg/m^3	15.0 μg/m^3	42 μg/m^3	65 μg/m^3.
Clairton	11.8 μg/m^3	15.0 μg/m^3	27 μg/m^3	65 μg/m^3.

EPA's modeling guidance states that additional analyses are recommended to determine if attainment will be likely, even if the modeled attainment test is ''passed.'' The guidance recommends supplementary analyses in all cases. EPA's modeling guidance describes how to use a photochemical grid model and additional analytical methods to complete a weight of evidence (WOE) analysis to estimate if emissions control strategies will lead to attainment. A WOE analysis is a supporting analysis that helps to determine if the results of the photochemical modeling system are, or are not, correctly predicting future air quality.

All models, including the CMAQ model, have inherent uncertainties. Over or under prediction may result from uncertainties associated with emission inventories, meteorological data, and representation of $PM_{2.5}$ chemistry in the model. Therefore, EPA modeling guidance provides for the consideration of other evidence to address these model uncertainties so that proper assessment of the probability to attain the applicable standards can be made. EPA modeling guidance states that those modeling analyses that show that attainment with the NAAQS will be reached in the future with some margin of safety (*i.e.,* estimated concentrations below 14.5 μg/m^3 for annual $PM_{2.5}$ and 62 μg/m^3 for 24-hour $PM_{2.5}$) need more limited supporting material.

Due to the fact that the modeling results presented in Table 4 fall below the aforementioned ''weight of evidence'' thresholds established by EPA, a limited supplemental analysis was deemed necessary to support the 2014 attainment demonstration. ACHD provided a WOE demonstration that consisted of an analysis of monitor trends, local and national emission control programs, population trends and monitoring concentrations during periods of low production. ACHD included a summary of various local and regional emission control programs being implemented in the Area, although some of these control measures may extend beyond the Liberty-Clairton Area and therefore, may have a lesser impact. Emission control programs used for WOE include Pennsylvania's wood boiler regulation, a wood stove change out program in southwest Pennsylvania, EPA's CSAPR as it was proposed, Allegheny County's diesel fuel engine retrofit program, local and state anti-idling campaigns and Allegheny County's program to reduce diesel particulate emissions. The additional reductions from these programs were used as further evidence supporting ACHD's conclusion that its SIP modeling demonstrates compliance with the 1997 $PM_{2.5}$ NAAQS.

Based on the technical information provided in the Liberty-Clairton Area attainment demonstration SIP revision, EPA concludes that the modeling and WOE analyses demonstrate attainment of the 1997 $PM_{2.5}$ NAAQS by the attainment date proposed as part of this notice (April 5, 2015). The demonstration shows that the Liberty-Clairton Area will attain the 1997 annual $PM_{2.5}$ NAAQS by 2015, which is as expeditiously as practical considering the area's elevated 2002 base year design values of 21.4 μg/m^3 for the annual NAAQS and 63 μg/m^3 for the 24-hour NAAQs at the Liberty monitor and the reasonably available control measures discussed above. ACHD's modeled 2014 design values for the Annual $PM_{2.5}$ NAAQS and the 24-Hour $PM_{2.5}$ NAAQS are expected to be below 15.0 μg/m^3 and 65 μg/m^3, respectively, indicating the nonattainment area satisfies the CAA requirement that SIPs provide for attainment of the NAAQS by the applicable attainment date.

However, because the regional CMAQ modeling relied upon EPA's CAIR program, EPA is requiring ACHD to provide an additional analysis to confirm model results, in light of EPA's promulgation of CSAPR on August 8, 2011 (76 FR 48208), to replace the remanded CAIR rule. While ACHD's SIP submittal predated EPA's promulgation of CSAPR, to ensure that the modeling demonstration is still valid, ACHD must update the analysis it included in section 13.3 of its attainment plan to include CSAPR instead of CAIR, and review and update, if appropriate, its modeling technical support document (TSD). To ensure that the analysis in the June 17, 2011 submittal is valid during the implementation of CSAPR, the results, with CSAPR, must show at least the same concentrations that resulted from the modeling demonstration with CAIR. EPA is, therefore, conditionally approving the modeling portion of the Liberty-Clairton Area attainment demonstration SIP. Final approval of the modeling demonstration portion of the SIP is contingent on ACHD's reanalysis of the elements included in section 13.3 of its attainment demonstration and the associated TSD to show that implementation of CSAPR provides at least equivalent model concentrations in the Liberty-Clairton Area as was shown in its June 17, 2011 submittal.

More detailed information about the modeling and our evaluation are available in the modeling TSD available in the docket for this rulemaking.

6. Determination of the Attainment Date

CAA Section 172(a)(2) provides that an area's attainment date ''shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than five years from the date such area was designated nonattainment, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment considering the severity of nonattainment and the availability and feasibility of pollution control measures.'' Because the effective date of designations for the 1997 $PM_{2.5}$ NAAQS is April 5, 2005 (See 70 FR 944), the initial attainment date for $PM_{2.5}$ nonattainment areas is as expeditiously as practicable, but not later than April 5, 2010. For any area that is granted a full five-year attainment date extension under CAA section 172, the attainment date would be not later than April 5, 2015. Section 51.1004 of the $PM_{2.5}$ Implementation Rule addresses the attainment date requirement. Section 51.1004(b) requires a state to submit an attainment demonstration justifying its proposed attainment date and provides that EPA will approve an attainment date when we approve that demonstration.

States that request an extension of the attainment date under CAA section 172(a)(2) must provide sufficient information to show that attainment by April 5, 2010 is impracticable due to the severity of the nonattainment problem in the area and the lack of available and feasible control measures to provide for earlier attainment. See, 40 CFR 51.1004(b). States must also demonstrate that all RACM and RACT for the area are being implemented to bring about attainment of the standard by the most expeditious alternative date practicable for the area. See, 72 FR 20586 at 20601.

In the course of evaluating whether the attainment date for the Liberty-Clairton Area should be extended, EPA has considered several factors. First, EPA has considered the technical basis supporting the attainment demonstration, including whether the emissions inventories and air quality modeling, are adequate. As discussed previously, EPA is proposing to approve the emissions inventories and conditionally approve the air quality modeling on which the Liberty-Clairton 1997 $PM_{2.5}$ attainment demonstration and other provisions are based. Second, EPA has considered whether the SIP submittal provides for expeditious

attainment through the implementation of all RACM and RACT. As discussed in section A.4, EPA is proposing to approve the RACM/RACT demonstration in the Liberty-Clairton $PM_{2.5}$ attainment demonstration. Third, EPA has considered whether the emissions reductions that are relied on for attainment are creditable. As discussed in section A.3, the Liberty-Clairton Area attainment demonstration relies on upgrades and shutdowns at the U.S. Steel Plant for reductions of $PM_{2.5}$, and regional reduction programs to achieve NO_X and SO_2 reductions, that are needed to attain the 1997 $PM_{2.5}$ standards in the Liberty-Clairton Area by April 5, 2015. Finally, EPA must determine whether the attainment demonstration provides sufficient information to show that attainment by April 5, 2010 is impracticable due to the severity of the nonattainment problem in the area and the lack of available and feasible control measures to provide for earlier attainment. See, 40 CFR 51.1004(b).

The Liberty-Clairton Area SIP submittal provides sufficient information to show that attainment by April 5, 2010 is impracticable due to the severity of the nonattainment problem in the area and the lack of available and feasible control measures to provide for earlier attainment. In particular, this submission includes sufficient modeling data to support a finding that the attainment date for the Liberty-Clairton Area should be April 5, 2015, and that the area qualifies for the full five-year extension of the attainment date allowable under section 172(a)(1). Furthermore, the SIP submittal provides for expeditious implementation of the available control programs. The implementation schedule for the controls is expeditious, while taking into account the time necessary for purchase and installation of the required control technologies.

Based upon the above considerations, EPA is proposing to determine that a five-year extension of the attainment date is appropriate given the severity of the nonattainment problem in the Liberty-Clairton Area, and the unavailability and infeasibility of additional control measures and, therefore, EPA is proposing to extend the attainment date in the Liberty-Clairton Area to April 5, 2015.

7. RFP

CAA section 172(c)(2) requires that plans for nonattainment areas shall provide for RFP. RFP is defined in section 171(1) as ''such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable [NAAQS] by the applicable date.'' For any area for which a state requests an extension of the attainment date beyond 2010, the $PM_{2.5}$ Implementation Rule requires submittal of an RFP plan at the same time as the submittal of the attainment demonstration. For areas for which the state requests a date extension to 2015, such as the Liberty-Clairton Area, the RFP plan must demonstrate that, in the applicable milestone years of 2009 and 2012, emissions in the area will be at a level consistent with generally linear progress in reducing emissions between the base year and the attainment year. See, 40 CFR 51.1009(d). States may demonstrate this by showing that emissions for each milestone year are roughly equivalent to benchmark emissions levels for direct $PM_{2.5}$ and each $PM_{2.5}$ attainment plan precursor addressed in the plan. The steps for determining the benchmark emissions levels to demonstrate generally linear progress are provided in 40 CFR 51.1009(f). Establishment of RFP milestones involves a determination of the total reductions that are needed for attainment, determination of the attainment year that is as expeditious as practicable, and the fraction of reductions that are achieved in each milestone year. The RFP plan must describe the control measures that provide for meeting the RFP milestones for the area, the timing of implementation of those measures, and the expected reductions in emissions of direct $PM_{2.5}$ and $PM_{2.5}$ attainment plan precursors. See, 40 CFR 51.1009(c).

For Liberty-Clairton, as discussed in section A.3, the total reductions needed, 878 tons of $PM_{2.5}$, have been identified in the modeling, and 2015 is the attainment date that is as expeditious as practicable. Benchmark levels are therefore required for milestone years 2009, 2012, and 2014. Table 5 below summarizes the benchmark emission reductions for each milestone year. Controlled emissions levels for direct $PM_{2.5}$, NO_X, and SO_2 were below the benchmarks for 2009, demonstrating that the Liberty-Clairton Area has met its RFP targets for that year. For 2012, the projected controlled emissions levels for direct $PM_{2.5}$ are only slightly above the benchmark (by about 16 percent) and the projected controlled levels for NO_X and SO_X are substantially below the benchmarks. For direct $PM_{2.5}$, these emissions include three additional minor sources that were not included in the modeling inventory shown in Table 1.

TABLE 5—SUMMARY OF RFP NEEDED FOR THE LIBERTY-CLAIRTON $PM_{2.5}$ ATTAINMENT DEMONSTRATION

Pollutant	Milestone year	Benchmark emissions (tons/year)	Cumulative emission reductions (tons/year)	Percent of emission reductions needed for attainment
$PM_{2.5}$	2002	2,270.6	.....	.....
	2009	1,968.8	301.8	34
	2012	1,849.9	420.7	48
	2014	1,392.6	878.0	100
NO_X	2002	229,571.7	.....	.....
	2009	120,414.1	109,157.6	90
	2012	108,565.5	121,006.2	100
	2014	108,565.5	121,006.2	100
SO_2	2002	587,201.4	.....	.....
	2009	141,772.8	445,428.6	98
	2012	132,598.7	454,602.7	100
	2014	132,598.7	454,602.7	100

As explained in section III.A.3 of this proposed rulemaking action, the control strategy for attainment in the Liberty-Clairton Area is to reduce emissions of direct $PM_{2.5}$. Other than regional reductions of NO_X and SO_2 within the surrounding Pittsburgh Area, no additional local reductions for these pollutants are necessary to attain by the attainment date. As such, in accordance with the $PM_{2.5}$ Implementation Rule, the pollutants to be addressed in the RFP plan are those pollutants that are subject to control measures in the attainment plan. Nevertheless, ACHD submitted milestone years and benchmark levels for NO_X and SO_2 from within the larger Pittsburgh Area that show generally linear progress for RFP in that area.

EPA has reviewed the RFP demonstration for $PM_{2.5}$ and has determined that it was prepared consistently with the applicable EPA regulations and policies. As can be seen from Table 5, EPA finds that, overall, the projected controlled emissions levels represent generally linear progress from the baseline year to the attainment year, and propose to find that the Liberty-Clairton $PM_{2.5}$ attainment demonstration SIP provides for reasonable further progress as required by CAA section 172(c)(2) and 40 CFR 51.1009.

8. Contingency Measures

Under CAA section 172(c)(9), all $PM_{2.5}$ attainment plans must include: (a) Contingency measures to be implemented if an area fails to meet RFP (RFP contingency measures); and (b) contingency measures to be implemented if an area fails to attain the $PM_{2.5}$ NAAQS by the applicable attainment date (attainment contingency measures). These contingency measures must be fully adopted rules or control measures that are ready to be implemented relatively quickly without significant additional action by the state. See, 40 CFR 51.1012. They must also be measures not relied on in the plan to demonstrate RFP or attainment and should provide SIP-creditable emissions reductions equivalent to approximately one year of the emissions reductions needed for RFP. See, 72 FR 20586 at 20642–43. Finally, the SIP should contain trigger mechanisms for the contingency measures and specify a schedule for their implementation.

Contingency measures may include federal, state and local measures already adopted and implemented or scheduled for implementation that provide emissions reductions in excess of the reductions needed to provide for RFP or expeditious attainment. EPA has approved numerous SIPs under this interpretation. See, direct final rule approving Indiana ozone SIP revision (62 FR 15844, April 3, 1997); final rule approving Illinois ozone SIP revision (62 FR 66279, December 18, 1997); direct final rule approving Rhode Island ozone SIP revision (66 FR 30811, June 8, 2001); final rule approving District of Columbia, Maryland, and Virginia ozone SIP revisions (66 FR 586, January 3, 2001); and final rule approving Connecticut ozone SIP revision (66 FR 634, January 3, 2001). The state may use the same measures for both RFP and attainment contingency, if the measures will provide reductions in the relevant years. However, should measures be triggered for failure to make RFP, the state would need to submit replacement contingency measures for attainment purposes.

The contingency measures in the Liberty-Clairton attainment demonstration for the 1997 $PM_{2.5}$ NAAQS meet the above requirements. These measures include emission reduction measures specified in the consent order and agreement between the ACHD and U.S. Steel and are listed in Table 6. In order to determine the reductions equivalent to one year's worth of RFP, ACHD started with the 2002 baseline emissions for the Liberty-Clairton Area (2270.6 tons/year), and subtracted the projected 2014 $PM_{2.5}$ emissions for the Area (1,392.6 tons/year), as taken from Table 5. The result (878 tons/year) is then divided by the number of years it takes to reach attainment. In this case, it is predicted that it will take 12 years for the area to achieve attainment, however, ACHD used 10 years in its calculation of RFP, which is acceptable, and calculated the targeted reductions for the contingency measures to be 87.8 tons per year of $PM_{2.5}$. Within 30 months of receiving notice that the area failed to meet RFP or attainment, U.S. Steel will implement one or more of the measures listed in Table 6. The measure chosen will depend on the amount needed to achieve RFP or attainment for the area. Because of the complexity of the measures, 30 months to implement one or all or these measures is reasonable, and is the time frame specified in the consent order and agreement.

TABLE 6—CONTINGENCY MEASURES AND RELATED EMISSIONS REDUCTIONS

Process	$PM_{2.5}$ 2014 inventory value (tons/year)	$PM_{2.5}$ contingency value (tons/year)	$PM_{2.5}$ reduction (inventory—contingency) value (tons/year)
New Low Emissions Tower for Batteries 1–3	274.8	102.5	172.3
Battery 20—Rebuilds, Combustion Stack	17.5	9.4	8.1
Battery 20—Rebuilds, Door Leaks	2.4	1.3	1.1
Total	294.7	113.2	181.5

Areas with an attainment date of April 2015 are required to provide contingency measures for 2009, 2012, and 2015. Due to the shutdown of Batteries 7–9 at the U.S. Steel Clairton Plant in April 2009, reductions required for RFP in 2009 have already been achieved. This shutdown provides for excess reductions above and beyond reductions that would otherwise be required during 2009, and the excess reductions are sufficient to provide for RFP for 2012 and 2015.

The plan does not calculate the emissions reductions that are equivalent to one year's worth of RFP for NO_X and SO_2 in the Liberty-Clairton Area. As explained in section A.3, due to the uniqueness of this nonattainment area and the primary emission sources contributing to nonattainment of the standard, there is substantial information supporting a finding that controlling direct $PM_{2.5}$ emissions in the Liberty-Clairton Area will provide for attainment of the standard as expeditiously as practicable, and local reductions of NO_X or SO_2 will not significantly contribute to attainment of the standard. As also explained in section A.3, it is more appropriate to ensure that a control strategy for these pollutants be implemented regionally in the larger Pittsburgh Area.

B. MVEBs for Transportation Conformity

CAA section 176(c) requires federal actions in nonattainment and maintenance areas to conform to the goals of SIPs. This means that such actions will not: (1) Cause or contribute to violations of a NAAQS; (2) worsen the severity of an existing violation; or (3) delay timely attainment of any NAAQS or any interim milestone. Actions involving Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) funding, or approval, are subject to the EPA's transportation conformity rule, codified at 40 CFR part 93, subpart A. Under this rule, Metropolitan Planning Organizations (MPOs) in nonattainment and maintenance areas coordinate with state and local air quality and transportation agencies, EPA, FHWA, and FTA to demonstrate that an area's regional transportation plans (RTPs) and transportation improvement programs (TIPs) conform to the applicable SIPs. This is typically determined by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the motor vehicle emissions budgets (MVEBs or budgets) contained in the SIP.

An MPO must use budgets in a submitted but not yet approved SIP, after EPA has determined that the budgets are adequate. Budgets in submitted SIPs may not be used before they are found adequate or are approved. In order for us to find a budget adequate, the submittal must meet the conformity adequacy requirements of 40 CFR 93.118(e)(4) and (5). Additionally, motor vehicle emissions budgets cannot be approved until EPA completes a detailed review of the entire SIP and determines that the SIP and the budgets will achieve their intended purpose (*i.e.,* RFP, attainment or maintenance). The budget must also reflect all of the motor vehicle control measures contained in the attainment and RFP demonstrations. See, 40 CFR 93.118(e)(4)(v).

Direct $PM_{2.5}$ SIP MVEBs should include $PM_{2.5}$ motor vehicle emissions from tailpipes, brake wear, and tire wear. States must also consider whether re-entrained paved and unpaved road dust or highway and transit construction dust are significant contributors and should be included in the direct $PM_{2.5}$ budget. See, 40 CFR 93.102(b) and 93.122(f) and the conformity rule preamble at 69 FR 40004, 40031–40036 (July 1, 2004). The applicability of emission trading between conformity budgets for conformity purposes is described in 40 CFR 93.124(c).

The SIP submittal includes MVEBs for direct $PM_{2.5}$ and NO_X for 2009, 2011, and 2012. The direct PM budgets did not include road dust emissions from paved and unpaved roads, or construction related fugitive dust emissions, due to the extremely small area that the Liberty-Clairton Area encompasses. The daily and annual MVEBs for the Liberty-Clairton Area are shown in Table 7 and Table 8, respectively.

TABLE 7—THE MVEBS FOR THE LIBERTY-CLAIRTON AREA FOR THE 1997 $PM_{2.5}$ 24-HOUR NAAQS ATTAINMENT DEMONSTRATION

Plan submittal	Year	MVEBs for direct PM	MVEBs for NO_X
Attainment Plan Demonstration—Daily Standards (Tons/Day)	2009	0.0004	0.180
Attainment Plan Demonstration—Daily Standards (Tons/Day)	2011	0.0004	0.146
Attainment Plan Demonstration—Daily Standards (Tons/Day)	2012	0.0004	0.129

TABLE 8—THE MVEBS OF THE LIBERTY-CLAIRTON AREA FOR THE 1997 $PM_{2.5}$ ANNUAL NAAQS ATTAINMENT DEMONSTRATION

Plan submittal	Year	MVEBs for direct PM	MVEBs for NO_X
Attainment Plan Demonstration—Annual Standards (Tons/Year)	2009	1.5	72.7
Attainment Plan Demonstration—Annual Standards (Tons/Year)	2011	1.4	58.9
Attainment Plan Demonstration—Annual Standards (Tons/Year)	2012	1.3	52.4

EPA has evaluated the adequacy of the MVEBs in the attainment demonstration for the Liberty-Clairton Area, using the evaluation criteria detailed in the Transportation Conformity Rule as part of our review of the budgets' approvability. The details of this review may be found in Section II of the MVEBs TSD, available in the Docket for this rulemaking. The MVEBs for the Liberty-Clairton Area $PM_{2.5}$ attainment plan are being posted to EPA's conformity Web site concurrently with this proposed action. The public comment period will end at the same time as the public comment period for this proposed action. In this case, EPA is concurrently processing the action on the attainment plan and the adequacy process for the MVEBs contained therein. In this action, EPA is proposing to find the MVEBs adequate, and also proposing to approve the MVEBs as part of the attainment plan. The MVEBs cannot be used for transportation conformity until the attainment plan and associated MVEBs are approved in a final **Federal Register** notice, or EPA otherwise finds the budgets adequate in a separate action following the comment period. Our action on the Liberty-Clairton Area MVEBs will also be announced on EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/index.htm*, (once there, click on ''Adequacy Review of SIP Submissions'').

IV. Proposed Actions

EPA is proposing to approve, with one condition, Pennsylvania's June 17, 2011 SIP revision submitted to EPA for the purpose of demonstrating attainment of the 1997 $PM_{2.5}$ NAAQS for the Liberty-Clairton Area. EPA proposes to determine that the attainment date for the 1997 $PM_{2.5}$ NAAQS in the Liberty-Clairton Area is April 5, 2015, and proposes to fully approve the attainment demonstration for the Liberty-Clairton Area that includes the base year and projected year emissions inventories, RFP plan, RACM/RACT analysis, contingency measures, and the MVEB.

EPA is proposing to conditionally approve the air quality modeling submitted to demonstrate attainment of the 1997 $PM_{2.5}$ NAAQS. In order for EPA to fully approve the modeling analysis, ACHD must revise the modeling to ensure that the modeling results in the demonstration continue to be valid, considering the reductions from CSAPR that will replace CAIR in 2012, and PADEP must submit the revised modeling as a SIP revision to EPA within one year from the final conditional approval, after which EPA will conduct rulemaking to fully approve the revision. EPA is also proposing to approve the addition of the definition of $PM_{2.5}$, the 1997 annual $PM_{2.5}$ standard of 15 μg/m³, the 24-hour standard of 35 μg/m³, and the related references into the ACHD regulations. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed approval of the Liberty-Clairton 1997 $PM_{2.5}$ attainment demonstration SIP and proposed conditional approval of the modeling portion of the attainment demonstration does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen dioxide, Particulate matter, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: October 31, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2011–28765 Filed 11–4–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

RIN 0648–BA81

Endangered and Threatened Wildlife and Plants; Proposed Rulemaking To Revise Critical Habitat for Hawaiian Monk Seals

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; reopening of public comment period.

SUMMARY: We, National Marine Fisheries Service (NMFS), published a proposed rule in the **Federal Register** on June 2, 2011, proposing to revise critical habitat for the Hawaiian monk seal under the Endangered Species Act and requesting information related to the proposed action. As part of that proposal, we provided a 90-day comment period, ending August 31, 2011. We have received requests for an extension of the public comment period. In response to these requests, NMFS is reopening the public comment period for the proposed action.

DATES: The comment period for the proposed rule published June 2, 2011, at 76 FR 32026, is reopened. Written comments on this proposed rule must be received by January 6, 2012. Comments received between the close of the first comment period on August 31, 2011, and the reopening of the comment period November 7, 2011 will be considered timely received.

ADDRESSES: You may submit written comments on the proposed rule identified by 0648–BA81 by any one of the following methods:

- *Electronic Submissions:* Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail or hand-delivery:* Submit written comments to Regulatory Branch Chief, Protected Resources Division, National Marine Fisheries Service, Pacific Islands Regional Office, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814, Attn.: Hawaiian monk seal proposed critical habitat.

Instructions: Comments must be submitted to one of these two addresses to ensure that the comments are received, documented, and considered by NMFS. Comments sent to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. We will accept anonymous comments (enter ''NA'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only. The petition, 90-day finding, 12-month finding, draft biological report, draft economic analysis report, draft ESA 4(b)(2) report, and other reference materials regarding this determination can be downloaded via the NMFS Pacific Islands Regional Office Web site: *http://www.fpir.noaa.gov/PRD/*

prd_critical_habitat.html or by submitting a request to the Regulatory Branch Chief, Protected Resources Division, National Marine Fisheries Service, Pacific Islands Regional Office, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814, Attn: Hawaiian monk seal proposed critical habitat. Background documents on the biology of the Hawaiian monk seal, the July 2, 2008, petition requesting revision of its critical habitat, and documents explaining the critical habitat designation process, can be downloaded from *http://www.fpir.noaa.gov/PRD/prd_critical_habitat.html,* or requested by phone or email from the NMFS staff in Honolulu (area code 808) listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Jean Higgins, NMFS, Pacific Islands Regional Office, (808) 944–2157; Lance Smith, NMFS, Pacific Islands Regional Office, (808) 944–2258; or Marta Nammack, NMFS, Office of Protected Resources (301) 427–8469.

SUPPLEMENTARY INFORMATION:

Background

On June 2, 2011, we published a proposed rule to revise the current critical habitat for the Hawaiian monk seal (*Monachus schauinslandi*) by extending the current designation in the Northwestern Hawaiian Islands (NWHI) out to the 500-meter (m) depth contour and including Sand Island at Midway Islands; and by designating six new areas in the main Hawaiian Islands (MHI), pursuant to section 4 of the Endangered Species Act (ESA). The proposed rule allowed for a 90-day public comment period, which ended on August 31, 2011.

NMFS subsequently received requests to extend the public comment period. These requests identified that additional time was needed to more fully consider the proposed rulemaking and provide comments on the proposed designation. In response to these requests, we are reopening the public comment period until January 6, 2012, to receive additional local and public information and comments that may be relevant to any aspect of the proposal. We will consider additional information received prior to making a final decision on critical habitat designation.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: November 2, 2011.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–28784 Filed 11–4–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 101217620–1654–02]

RIN 0648–BA62

Amendments to the Reef Fish, Spiny Lobster, Queen Conch and Coral and Reef Associated Plants and Invertebrates Fishery Management Plans of Puerto Rico and the U.S. Virgin Islands

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to implement Amendment 6 to the Fishery Management Plan (FMP) for the Reef Fish Fishery of Puerto Rico and the U.S. Virgin Islands, Amendment 5 to the FMP for the Spiny Lobster Fishery of Puerto Rico and the U.S. Virgin Islands, Amendment 3 to the FMP for the Queen Conch Resources of Puerto Rico and the U.S. Virgin Islands, and Amendment 3 to the FMP for Corals and Reef Associated Plants and Invertebrates of Puerto Rico and the U.S. Virgin Islands (2011 Caribbean ACL Amendment) prepared by the Caribbean Fishery Management Council (Council). This proposed rule would: Establish annual catch limits (ACLs) and accountability measures (AMs) for reef fish, spiny lobster, and aquarium trade species which are not determined to be undergoing overfishing; allocate ACLs among island management areas and, in Puerto Rico only, among commercial and recreational sectors; establish recreational bag limits for reef fish and spiny lobster; remove eight conch species from the queen conch FMP; and establish framework procedures for the spiny lobster and Caribbean corals and reef associated plants and invertebrates FMPs. The 2011 Caribbean ACL Amendment would also revise management reference points and status determination criteria for selected reef fish, spiny lobster, and aquarium trade species. The intended effect of the rule is to prevent overfishing of reef fish, spiny lobster, and aquarium trade species while maintaining catch levels consistent with achieving optimum yield (OY).

DATES: Written comments must be received on or before November 22, 2011.

ADDRESSES: You may submit comments on the proposed rule identified by ''NOAA–NMFS–2011–0017'', by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Miguel Lugo or Maria Lopez, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the Federal e-Rulemaking Portal: *http:www.regulations.gov,* click on ''submit a comment,'' then enter ''NOAA–NMFS–2011–0017'' in the keyword search and click on ''search.'' To view posted comments during the comment period, enter ''NOAA–NMFS–2011–0017'' in the keyword search and click on ''search''. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Comments received through means not specified in this rule will not be considered.

Electronic copies of the 2011 Caribbean ACL Amendment, which includes an environmental impact statement (EIS), an initial regulatory flexibility analysis (IRFA), a regulatory impact review, and a fishery impact statement may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov/sf/pdfs/2011_ACL_Amendment_FEIS_102511.pdf.*

FOR FURTHER INFORMATION CONTACT: Miguel Lugo or Maria Lopez, Southeast Regional Office, NMFS, telephone: (727) 824–5305, or email: *Miguel.Lugo@noaa.gov* or *Maria.Lopez@noaa.gov.*

SUPPLEMENTARY INFORMATION: In the exclusive economic zone (EEZ) of the U.S. Caribbean, the reef fish fishery is managed under the Fishery Management Plan (FMP) for the Reef Fish Fishery of Puerto Rico and the U.S. Virgin Islands, spiny lobster is managed under the FMP for the Spiny Lobster Fishery of Puerto Rico and the U.S.

Virgin Islands, conch is managed under the FMP for the Queen Conch Resources of Puerto Rico and the U.S. Virgin Islands, and aquarium trade species fisheries are managed under the FMP for Reef Fish and the FMP for Coral and Reef Associated Plants and Invertebrates of Puerto Rico and the U.S. Virgin Islands. These FMPs were prepared by the Council and are implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

The 2006 reauthorization of the Magnuson-Stevens Act requires that for the fisheries determined by the Secretary of Commerce (Secretary) to be not subject to overfishing, ACLs and AMs must be established in 2011 at a level that prevents overfishing and helps to achieve OY. These mandates are intended to ensure fishery resources are managed for the greatest overall benefit to the nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems.

NMFS' 2011 Report on the Status of U.S. Fisheries classifies Caribbean spiny lobster, angelfishes, boxfishes, goatfishes, grunts, wrasses, jacks, scups and porgies, squirrelfishes, surgeonfishes, triggerfishes and filefishes, tilefishes, and aquarium trade species as unknown with respect to their status regarding overfishing. The eight species of conch proposed to be removed from the Queen Conch FMP are currently in the FMP as data collection only species and were not assessed through this report.

Provisions Contained in This Proposed Rule

Revise Management Reference Points

The Magnuson-Stevens Act requires that FMPs specify a number of reference points for managed fish stocks, including maximum sustainable yield (MSY), OY, and stock status determination criteria that can be used to determine when a fishery is overfished and/or undergoing overfishing. These reference points are intended to provide the means to measure the status and performance of fisheries relative to established goals. Proxies have been established for these reference points because available data in the U.S. Caribbean are not sufficient to support direct estimation of these parameters. The FMP Amendments would revise three of those proxies. First, they would use either the median or average of landings data for a determined year sequence as a proxy for MSY for all units or complexes. The time period during which average catch is calculated for those species is 1988–2009 for the commercial sector of Puerto Rico, 2000–2009 for the recreational sector of Puerto Rico, 1999–2008 for the commercial sector St. Croix, and 2000–2008 for the commercial sector of St. Thomas/St. John. These year sequences represent the longest year sequence of reliable landings data that the Council considers to be consistently reliable across the islands of the U.S. Caribbean. The MSY proxy for these species in Puerto Rico would be set by the median of the annual landings in the year sequence above. For St. Croix and St. Thomas/St. John, the MSY equals the average of annual landings for the year sequence described above. The MSY for surgeonfish and angelfish was defined as three times the single year maximum of recreational landings for Puerto Rico. The FMP amendments would also define the overfishing threshold of all species as the overfishing limit (OFL), which would equal the MSY proxy. For the majority of species units or complexes, OY would equal the MSY proxy multiplied by a reduction factor to account for any uncertainty in the scientific and management process. The reduction factor would be 10 percent for all species, except a 25 percent reduction would be applied for surgeonfish, angelfish and aquarium trade species to account for greater uncertainty for those species.

Removal of Stocks From the Queen Conch FMP

Currently, the conch complex within the Queen Conch FMP is composed of nine species. This rule would remove eight conch species from that FMP. These species are milk conch (*Strombus costatus*), West Indian fighting conch (*Strombus pugilis*), roostertail conch (*Strombus gallus*), hawkwing conch (*Strombus raninus*), true tulip (*Fasciolaria tulipa*), Atlantic triton's trumpet (*Charonia variegata*), cameo helmet (*Cassis madagascarensis*), and green star shell (*Astrea tuber*). After implementation of this rule, only the queen conch (*Strombus gigas*), would remain as a managed species in the conch FMP. The eight species of conch proposed to be removed from the Queen Conch FMP are currently in the FMP as data collection only species and were not assessed in the NMFS 2011 Report on the Status of U.S. Fisheries. These species were classified as data collection only species because the Council determined there was not enough information available to specify biological reference points and/or management measures for that species (50 CFR 600.320(d)(2)). Under the new National Standard 1 Guidelines, the Council was required to either remove these species from the FMP, re-classify them as Ecosystem Component Species, or specify status determination criteria for them (50 CFR 600.310(d)). These eight species are not generally targeted for harvest. No landings data are available for these species and the Council believes that any landings are minimal. Accordingly, the Council determined that there was no need for Federal conservation and management of these species, and decided to remove them from the FMP.

Island Specific Management

This rule would also implement island-specific management to enable application of AMs in response to harvesting activities on a single island (Puerto Rico, St. Croix) or island group (St. Thomas/St. John) without necessarily affecting fishing activities on the other islands or island groups. For example, if the ACL for the jacks complex is divided among Puerto Rico, St. Croix and St. Thomas/St. John and the St. Croix fishery exceeds its ACL for jacks, then an AM can be applied in the Federal waters surrounding St. Croix without necessarily affecting harvest of jacks in Federal waters surrounding Puerto Rico or St. Thomas/St. John. This rule proposes geographic boundaries between islands/island groups based upon an equidistant approach that uses a mid-point to divide the exclusive economic zone (EEZ) among islands. The three island management areas are: Puerto Rico, St. Croix, and St. Thomas/St. John.

Establish Annual Catch Limits and Accountability Measures

This proposed rule would establish ACLs and AMs for angelfish, boxfish, goatfishes, grunts, wrasses, jacks, scups and porgies, squirrelfishes, surgeonfish, triggerfish and filefish, tilefish, spiny lobster, and aquarium trade species units or complexes in the Caribbean Reef Fish, Spiny Lobster, and Coral and Reef Associated Plants and Invertebrates FMPs. The harvest of Caribbean prohibited coral that are contained within the FMP for Coral and Reef Associated Plant and Invertebrates, and that are not described as aquarium trade species, is prohibited by Federal regulations. Therefore, a functional ACL of zero will be considered for these prohibited species. Additionally, the harvest prohibition serves as a functional AM to manage the ACL.

Each ACL would be sub-divided among the three islands/island groups except that the ACL for tilefish and aquarium trade species would be applicable for the entire Caribbean EEZ. Landings data records do not exist for tilefish and aquarium trade species in the U.S. Virgin Islands. For this reason, a Caribbean-wide ACL would be established for tilefish and aquarium trade species based on the Puerto Rico median landings for these species. Separate commercial and recreational sector ACLs would be established for the Puerto Rico management area where landings data are available for both sectors. For the other island management areas (St. Croix and St. Thomas/St. John), only commercial data are available, therefore, ACLs would be established for the St. Croix and St. Thomas/St. John management areas based on commercial landings data only. Commercial data used to monitor those ACLs would be derived from trip ticket reports collected from territorial governments and recreational data used to monitor the Puerto Rico recreational ACLs would be derived from the Marine Recreational Fisheries Statistics Survey, or its successor, the Marine Recreational Information Program.

U.S. Caribbean landings data generally do not provide useful information at the species level for the species addressed in the 2011 Caribbean ACL Amendment. Aggregate ACLs would be established at the complex level for species in each island management area.

The allowable biological catch (ABC) proposed for these units or complexes are derived from the OFL (MSY proxy)(or SSC-recommended OFL). In most cases, the ABC is equal to the OFL, and then reduced by 10 percent to specify ACL and OY to buffer for scientific and management uncertainty, reducing the probability that overfishing will occur. The surgeonfish and angelfish ABCs are reduced by 25 percent to specify ACL and OY to further reduce the impacts of surgeonfish and angelfish harvest on Acropora species in U.S. Caribbean waters. The aquarium trade species ABC is reduced by 25 percent due to the level of uncertainty about the fishery in the EEZ and most of the harvest occurs in territorial waters.

If implemented, the accountability measures in this rule are designed to prevent fishermen from exceeding the ACLs. Two components are considered, the first identifies the conditions under which AMs would be triggered and the second describes the action(s) that would occur if AMs are triggered. This rule would trigger AMs if an ACL has been exceeded based on a moving multi-year average of landings as described in the FMP. Both commercial and recreational landings of a species, unit, or complex vary substantially from year to year; applying a multi-year average is intended to dampen that variability. The rule would reduce the length of the fishing season for the affected species, unit or complex the year following the year it is determined that the ACL was exceeded by the amount needed to prevent such an overage from occurring again. The AM is triggered unless NMFS' SEFSC, in consultation with the Council and its SSC, determines the overage occurred because data collection and monitoring improved rather than because catches actually increased.

General Management Measures

This rule would establish an aggregate bag limit for the recreational harvest of angelfishes, boxfishes, goatfishes, grunts, wrasses, jacks, scups and porgies, squirrelfishes, surgeonfishes, triggerfishes and filefishes, and tilefishes. The daily recreational bag limit for the described reef fish species would be five fish per person per day, with no more than one surgeonfish per person per day allowed within the aggregate. This rule would also establish a vessel limit of 15 fish per vessel per day, including no more than 4 surgeonfish per vessel per day. The rule would also set a bag limit of 3 spiny lobster per person per day with a vessel limit of 10 spiny lobster per vessel per day.

Framework Measures

This rule proposes framework measures for both the Spiny Lobster and the Coral and Reef Associated Plants and Invertebrates FMPs. Management measures proposed to be adjusted through framework procedures include but are not limited to quotas, closures, trip limits, bag limits, size limits, gear restrictions, fishing years, and reference points. The purpose of these framework measures is to allow the Council to more expeditiously adjust management in response to changing fishery conditions.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this rule is consistent with Caribbean 2011 ACL Amendment, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This rule has been determined to be not significant for purposes of Executive Order 12866. However, ACLs are a controversial issue in the U.S. Caribbean, which is a region with populations characterized by large percents of racial/ethnic minorities, high poverty rates, and low median household incomes. Moreover, commercial fishermen of St. Croix and St. Thomas/St. John would experience a substantially disproportionate adverse economic impact relative to their counterparts in Puerto Rico.

NMFS prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act, for this rule. The IRFA describes the economic impact that this rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the objectives of, and legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of the full analysis is available from the Council (see **ADDRESSES**). A summary of the IRFA follows.

The rule, which consists of several actions, would: Establish recreational bag limits for spiny lobster and specified reef fish species; specify ACLs and AMs for Caribbean spiny lobster, reef fish, and aquarium trade species not determined to be undergoing overfishing; and establish framework measures to facilitate regulatory modifications.

The Magnuson Stevens Act provides the statutory basis for the rule.

No duplicative, overlapping, or conflicting Federal rules have been identified; however, Federal regulations that impose seasonal or year-round prohibitions on fishing in Federal waters of the U.S. Caribbean that may affect fishing for these Units are identified in the IRFA. The rule would not alter existing reporting or record-keeping requirements. The rule would establish recreational bag limits for Caribbean spiny lobster and reef fish and provide NMFS the authority to restrict harvest in areas of the EEZ where annual or average annual landings of a stock, complex or unit exceed the relevant ACL.

This rule is expected to directly affect businesses that harvest spiny lobster, reef fish, and aquarium trade species from Federal waters off Puerto Rico and the USVI. These businesses are in the finfish fishing (NAICS 114111), shellfish fishing (NAICS 114112) and charter fishing industries (NAICS 487210). A business is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and

has combined annual receipts or number of employees not in excess of the Small Business Administration's (SBA's) size standards. The finfish and shellfish fishing industries have an SBA size standard of $4.0 million in annual receipts, and the charter fishing industry's size standard is $7.0 million in annual receipts. The IRFA assumes all commercial (finfish and shellfish) and charter fishing businesses that operate in the U.S. Caribbean have annual receipts less than these size standards and are small businesses.

In 2008, there were from 868 to 874 active commercial fishermen in Puerto Rico; 74 percent of these fishermen were captains and the remaining 26 percent were crew members. The IRFA assumes each captain represents a small business in the finfish fishing and shellfish fishing industries and each member of the crew an employee of one of those businesses. Therefore, it is concluded that there are 642 to 644 small businesses in the finfish fishing and shellfish fishing industries in Puerto Rico and potentially all of these businesses could be directly affected by the rule. In 2008, there were 223 licensed commercial fishermen in St. Croix and 160 in St.Thomas/St. John. There is a moratorium on the number of U.S. Virgin Islands commercial fishing licenses, so the IRFA assumes the 223 commercial fishermen in St. Croix and 160 commercial fishermen in St. Thomas/St. John represent 383 small businesses in the finfish fishing and shellfish fishing industries in the U.S. Virgin Islands who could be directly affected by the rule.

There are an estimated 9 small businesses in the charter fishing industry in Puerto Rico, 12 such businesses in St. Thomas/St. John and 1 in St. Croix. The rule would apply to all of these small businesses.

The rule would apply to all small businesses in Puerto Rico, St. Croix and St. Thomas/St. John within the finfish fishing, shellfish fishing, and charter fishing industries. Therefore, the rule applies to a substantial number of small entities in the U.S. Caribbean in these industries.

Charter fishing operations in Puerto Rico and the U.S. Virgin Islands target pelagic species and tend not to target spiny lobster or reef fish species in Federal waters. Consequently, it is expected that small businesses in the charter fishing industry in Puerto Rico, St. Croix or St. Thomas/St. John would experience little to no adverse economic impact because of the rule.

A comparison of the proposed Puerto Rico commercial ACLs for aquarium trade species, angelfish, boxfish, goatfish, grunts, jacks, scups and porgies, spiny lobster, surgeonfish, tilefish, squirrelfish and triggerfish/filefish, to average annual commercial landings from 2006 to 2007 suggests the proposed commercial ACLs for these complexes would not require reductions in the lengths of the Federal commercial fishing seasons for these complexes in the Puerto Rico EEZ. Therefore, there would be no adverse economic impact on small businesses in Puerto Rico that harvest these species.

The proposed Puerto Rico commercial hogfish/wrasses ACL is less than the average of annual landings of hogfish/wrasses from 2006 to 2009, which suggests there would be an overage of hogfish/wrasses landings in 2011, assuming the ACL is implemented by early 2012, that would require a shortened Federal fishing season in the Puerto Rico EEZ in 2012 by approximately 7 days and similarly thereafter. Puerto Rico's commercial fishermen could mitigate for the potentially shortened hogfish/wrasses fishing season in the Puerto Rico EEZ by targeting other species during the time that the Federal hogfish/wrasses fishing season is closed or they could move into territorial waters to harvest hogfish/wrasses species during the time the Federal season is closed. Approximately 95 percent of fishable area off Puerto Rico is in territorial waters. It is expected that small businesses would mitigate for the potential loss of 1,076 lb (488 kg) of hogfish/wrasses by relocating into territorial waters during the approximately 7 days the hogfish/wrasses fishing season is closed in the Puerto Rico EEZ with little to no displacement costs.

This rule is expected to have a substantially greater adverse economic impact on small businesses in the finfish fishing and shellfish fishing industries in St. Croix and St. Thomas/St. John than in Puerto Pico. St. Croix small businesses would incur annual losses of landings of up to 24.3 percent of their average annual landings of all species that are the subject of this action. St. Thomas/St. John small businesses would incur annual losses of landings of up to 12.6 percent of their average annual landings of all species that are the subject of this action. Assuming ACLs are implemented early in 2012, St. Croix commercial fisherman are expected to lose 21 day of boxfish, 68 days of grunts, 253 days of hogfish/wrasses, 54 days of scups and porgies, 112 days of spiny lobster, 242 days of squirrelfish, 101 days of surgeonfish, and 50 days of triggerfish fishing in the EEZ in 2012, and thereafter. Additionally, assuming the ACLs are implemented in 2012 and there are shortened commercial seasons beginning in 2012, St. Thomas/St. John commercial fisherman would lose 93.5 days of angelfish, 90.8 days of boxfish, 20 days of grunts, 193 days of hogfish/wrasses, 56 days of jacks, 25 days of scups and porgies, 52 days of spiny lobster, 84 days of surgeonfish, and 5.5 days of triggerfish fishing in the EEZ in 2012, and thereafter.

The percent of fishable area in the U.S. Virgin Islands' territorial waters is significantly less than the percent of fishable area in Puerto Rico's territorial waters. Thirty-eight percent of fishable area off the U.S. Virgin Islands lies within the U.S. Caribbean EEZ, and a larger share of landings in St. Croix and St. Thomas/St. John derive from fishing in the EEZ than in Puerto Rico. Hence, it is more difficult for U.S. Virgin Islands fishermen to substitute fishing in territorial waters for fishing in Federal waters.

Among the considered but rejected significant alternatives for the action to establish the triggering mechanism for AMs were two alternatives which would use a single year's landings to trigger the AMs. Also considered but rejected were alternatives that would use a single year's landings in 2011 and then use a 2-year annual average starting in 2012 and continuing thereafter to trigger the AMs. The preferred alternative would use a 3-year average starting in 2013 and continuing thereafter. The adverse economic impact of the preferred alternative is less than the adverse economic impacts of the rejected alternatives. This adverse economic impact is less because a 3-year average allows for yearly or 2-year averages to exceed the ACL without triggering a shortened fishing season when the 3-year average may be equal to or less than the ACL.

An alternative that would include an ACL overage payback as part of the action applying an AM when an ACL is exceeded was considered but rejected because it would require a larger reduction in the Federal fishing season, and thus a larger adverse economic impact, than the preferred alternative to not implement an ACL overage payback.

The Council's preferred alternative for Action 1(b) setting the ABC for reef fish sets the ABC equal to the OFL. This alternative would have a smaller indirect adverse economic impact than considered but rejected alternatives that would set lower ABCs, and in turn establish lower ACLs. The preferred alternatives 2(p) (setting ACLs for all reef fish FMUs, except for angelfish and surgeonfish) and 2(n)(setting ACLs for angelfish and surgeonfish), would have

smaller indirect adverse economic impact than the considered but rejected alternatives that would establish lower ABCs and ACLs.

The preferred alternative for Action 2(b) that sets ABC equal to OFL for spiny lobster (alternative 2(g)) would have a smaller indirect adverse economic impact than considered but rejected alternatives that would set lower ABCs, which in turn could lead to lower ACLs. Preferred alternative 2(o) would have a smaller indirect adverse economic impact than the considered but rejected alternatives that would establish lower ACLs.

The preferred alternative for Action 3(b) that sets the ABC equal to the OFL for aquarium trade species (alternative 2(e)) would have a smaller adverse economic impact than considered but rejected alternatives that would establish lower ABCs and likely lower ACLs. Preferred alternative 2(k) that would set the ACL would have a smaller indirect adverse economic impact than the considered but rejected alternative that would establish a lower ACL.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: November 2, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622, as proposed to be amended at 76 FR 66675, October 27, 2011, is proposed to be further amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 622.39, paragraph (g)(2) is revised and paragraph (h) is added to read as follows:

§ 622.39 Bag and possession limits.

* * * * *

(g) * * *

(2) *Bag limits.* (i) Groupers, snappers, and parrotfishes combined—5 per person per day or, if 3 or more persons are aboard, 15 per vessel per day; but not to exceed 2 parrotfish per person per day or 6 parrotfish per vessel per day.

(ii) Other reef fish species combined—5 per person per day or, if 3 or more persons are aboard, 15 per vessel per day, but not to exceed 1 surgeonfish per person per day or 4 surgeonfish per vessel per day.

(h) *Caribbean spiny lobster*—(1) *Applicability.* Paragraph (a)(1) of this section notwithstanding, the bag limit of paragraph (h)(2) of this section does not apply to a fisherman who has a valid commercial fishing license issued by Puerto Rico or the U.S. Virgin Islands.

(2) *Bag limit.* The bag limit for spiny lobster in or from the Caribbean EEZ is 3 per person per day, not to exceed 10 per vessel per day, whichever is less.

3. In § 622.48, paragraphs (n) and (o) are added to read as follows:

§ 622.48 Adjustment of management measures.

* * * * *

(n) *Caribbean spiny lobster.* Fishery management unit (FMU), quotas, trip limits, bag limits, size limits, closed seasons or areas, gear restrictions, fishing years, MSY, OY, TAC, maximum fishing mortality threshold (MFMT), minimum stock size threshold (MSST), overfishing limit (OFL), acceptable biological catch (ABC) control rules, ACLs, AMs, ACTs, and actions to minimize the interaction of fishing gear with endangered species or marine mammals.

(o) *Caribbean corals and reef associated plants and invertebrates.* Fishery management units (FMUs), quotas, trip limits, bag limits, size limits, closed seasons or areas, gear restrictions, fishing years, MSY, OY, TAC, MFMT, MSST, OFL, ABC control rules, ACLs, AMs, ACTs, and actions to minimize the interaction of fishing gear with endangered species or marine mammals.

4. In § 622.49, introductory paragraph (c) is revised and paragraphs (c)(1)(i)(H) through (R), (c)(1)(ii)(H) through (Q), (c)(2)(i)(E) through (O), (c)(3)(i)(E) through (O), and (c)(4) are added to read as follows:

§ 622.49 Annual catch limits (ACLs) and accountability measures (AMs).

* * * * *

(c) *Caribbean island management areas/Caribbean EEZ.* If landings from a Caribbean island management area, as specified in Appendix E to part 622, except for landings of queen conch (see § 622.33(d)), or landings from the Caribbean EEZ for tilefish and aquarium trade species, are estimated by the SRD to have exceeded the applicable ACL, as specified in paragraph (c)(1) for Puerto Rico management area species or species groups, paragraph (c)(2) for St. Croix management area species or species groups, paragraph (c)(3) for St. Thomas/St. John management area species or species groups, or paragraph (c)(4) for the Caribbean EEZ, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to reduce the length of the fishing season for the applicable species or species groups that year by the amount necessary to ensure landings do not exceed the applicable ACL. If NMFS determines the ACL for a particular species or species group was exceeded because of enhanced data collection and monitoring efforts instead of an increase in total catch of the species or species group, NMFS will not reduce the length of the fishing season for the applicable species or species group the following fishing year. Landings will be evaluated relative to the applicable ACL based on a moving multi-year average of landings, as described in the FMP. With the exceptions of Caribbean queen conch in Puerto Rico and St. Thomas/St. John management areas, goliath grouper, Nassau grouper, midnight parrotfish, blue parrotfish, and rainbow parrotfish, ACLs are based on the combined Caribbean EEZ and territorial landings for each management area. The ACLs specified in paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) of this section are given in round weight. (See § 622.32 for limitations on taking prohibited and limited harvest species. The limitations in § 622.32 apply without regard to whether the species is harvested by a vessel operating under a valid commercial fishing license issued by Puerto Rico or the U.S. Virgin Islands or by a person subject to the bag limits.)

(1) * * *

(i) * * *

(H) *Angelfish*—8,984 lb (4,075 kg).

(I) *Boxfish*—86,115 lb (39,061 kg).

(J) *Goatfishes*—17,565 lb (7,967 kg).

(K) *Grunts*—182,396 lb (82,733 kg).

(L) *Wrasses*—54,147 lb (24,561 kg).

(M) *Jacks*—86,059 lb (39,036 kg).

(N) *Scups and porgies, combined*—24,739 lb (11,221 kg).

(O) *Squirrelfish*—16,663 lb (7,558 kg).

(P) *Surgeonfish*—7,179 lb (3,256 kg).

(Q) *Triggerfish and filefish, combined*—58,475 lb (26,524 kg).

(R) *Spiny lobster*—327,920 lb (148,742 kg).

(ii) * * *

(H) *Angelfish*—4,492 lb (2,038 kg).

(I) *Boxfish*—4,616 lb (2,094 kg).

(J) *Goatfishes*—362 lb (164 kg).

(K) *Grunts*—5,028 lb (2,281 kg).

(L) *Wrasses*—5,050 lb (2,291 kg).

(M) *Jacks*—51,001 lb (23,134 kg).

(N) *Scups and porgies, combined*—2,577 lb (1,169 kg).

(O) *Squirrelfish*—3,891 lb (1,765 kg).

(P) *Surgeonfish*—3,590 lb (1,628 kg).

(Q) *Triggerfish and filefish, combined*—21,929 lb (9,947 kg).

(2) * * *

(i) * * *

(E) *Angelfish*—305 lb (138 kg).

(F) *Boxfish*—8,433 lb (3,825 kg).

(G) *Goatfishes*—3,766 lb (1,708 kg).

(H) *Grunts*—36,881 lb (16,729 kg).

(I) *Wrasses*—7 lb (3 kg).

(J) *Jacks*—15,489 lb (7,076 kg).

(K) *Scups and porgies, combined*—4,638 lb (2,104 kg).

(L) *Squirrelfish*—121 lb (55 kg).

(M) *Surgeonfish*—33,603 lb (15,242 kg).

(N) *Triggerfish and filefish, combined*—24,980 lb (11,331 kg).

(O) *Spiny lobster*—107,307 lb (48,674 kg).

(3) * * *

(i) * * *

(E) *Angelfish*—7,897 lb (3,582 kg).

(F) *Boxfish*—27,880 lb (12,646 kg).

(G) *Goatfishes*—320 lb (145 kg).

(H) *Grunts*—37,617 lb (17,063 kg).

(I) *Wrasses*—585 lb (265 kg).

(J) *Jacks*—52,907 lb (23,998 kg).

(K) *Scups and porgies, combined*—21,819 lb (9,897 kg).

(L) *Squirrelfish*—4,241 lb (1,924 kg).

(M) *Surgeonfish*—29,249 lb (13,267 kg).

(N) *Triggerfish and filefish, combined*—74,447 lb (33,769 kg).

(O) *Spiny lobster*—104,199 lb (47,264 kg).

(4) *Caribbean EEZ.* (i) *ACLs.* The following ACLs apply to landings of species or species groups throughout the Caribbean EEZ.

(A) *Tilefish*—14,642 lb (6,641 kg).

(B) *Aquarium trade species*—8,155 lb (3,699 kg).

(ii) [Reserved]

5. Table 5 of Appendix A to part 622 is revised to read as follows:

Appendix A to Part 622—Species Tables

* * * * *

Table 5 of Appendix A to Part 622—Caribbean Conch Resources

Queen conch, *Strombus gigas.*

[FR Doc. 2011–28761 Filed 11–4–11; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 76, No. 215
Monday, November 7, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Ashley National Forest Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting cancellation.

SUMMARY: The Ashley National Forest Resource Advisory Committee was scheduled to meet on November 10, 2011 from 6 to 8 p.m. in the Forest Supervisor's Office located at 355 North Vernal Avenue, Vernal Utah 84078. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The committee's charter expired in October 2011 and its renewal is under review by the Secretary of Agriculture. In compliance with the Federal Advisory Committee Act the committee will not be meeting until the charter is renewed.

DATES: The cancelled meeting was scheduled for Wednesday, November 10, 2011, from 6 to 8 p.m.

ADDRESSES: The cancelled meeting would have been held at the Forest Supervisor's Office, 355 North Vernal Avenue, Vernal, Utah 84078. Written comments concerning this cancellation may be submitted to the Designated Federal Officer.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at 355 Vernal Avenue, Vernal, Utah 84078. Please call ahead to (435) 781–5105 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: JoEllen Keil, Acting Designated Federal Officer, Ashley National Forest, 355 North Vernal Avenue, Vernal, Utah 84078: Telephone: (435) 781–5136 or email at: *jkeil@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

Dated: October 27, 2011.

JoEllen Keil,

Acting Forest Supervisor.

[FR Doc. 2011–28668 Filed 11–4–11; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Shasta County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting cancellation.

SUMMARY: The Shasta County Resource Advisory Committee was scheduled to meet Wednesday, November 30, 2011 in Redding, California. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The committee's charter expired in October 2011 and its renewal is under review by the Secretary of Agriculture. In compliance with the Federal Advisory Committee Act, the committee will not be meeting until the charter is renewed.

DATES: The cancelled meeting was scheduled for on 30, November, 2011, 8:30 a.m.

ADDRESSES: The canceled meeting would have been held at the USDA Service Center, 3644 Avtech Parkway, Redding, California 96002. Written comments concerning this cancellation may be submitted to the Designated Federal Officer.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at 3644 Avtech Parkway, Redding, CA 96002. Please call ahead to (530) 226–2500 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Donna Harmon, Designated Federal Officer, Shasta-Trinity National Forest, 3644 Avtech Parkway, Redding, CA 96002. Telephone: (530) 226–2335 or email at: *dharmon@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

Dated: October 27, 2011.

Donna Harmon,

Designated Federal Officer, Shasta-Trinity National Forest RAC.

[FR Doc. 2011–28696 Filed 11–4–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

University of Arkansas, et al.; Notice of Consolidated Decision on Applications for Duty-Free Entry of Electron Microscope

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Room 3720, U.S. Department of Commerce, 14th and Constitution Avenue NW., Washington, DC.

Docket Number: 11–059. *Applicant:* University of Arkansas Office of Business Affairs, Fayetteville, AR 72701–1201. *Instrument:* Electron Microscope. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* See notice at 76 FR 61668, October 5, 2011.

Docket Number: 11–060. *Applicant:* Brookhaven National Laboratory, Upton, NY 11973. *Instrument:* Electron Microscope. *Manufacturer:* JEOL, Ltd., Japan. *Intended Use:* See notice at 76 FR 58245, September 20, 2011.

Docket Number: 11–062. *Applicant:* University of Buffalo, Buffalo, NY 14203. *Instrument:* Electron Microscope. *Manufacturer:* FEI, Czech Republic. *Intended Use:* See notice at 76 FR 61668, October 5, 2011.

Docket Number: 11–063. *Applicant:* Mount Sinai School of Medicine, New York, NY 10029–6574. *Instrument:* Electron Microscope. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* See notice at 76 FR 61669, October 5, 2011.

Docket Number: 11–064. *Applicant:* University of Wyoming, Laramie, WY 82071. *Instrument:* Electron Microscope. *Manufacturer:* FEI, Czech Republic. *Intended Use:* See notice at 76 FR 61669, October 5, 2011.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as this instrument is intended to be used, is being manufactured in the United States at the time the instrument was ordered. *Reasons:* Each foreign instrument is an electron microscope and is intended for research or scientific educational uses requiring an electron microscope. We know of no electron microscope, or any other instrument suited to these purposes, which was being manufactured in the United States at the time of order of each instrument.

Dated: November 1, 2011.

Gregory W. Campbell,

Director, Subsidies Enforcement Office, Import Administration.

[FR Doc. 2011–28799 Filed 11–4–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA807

Marine Mammals and Endangered Species; File No. 16305

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that John P. Wise, Sr., Ph.D., Wise Laboratory of Environmental and Genetic Toxicology, Maine Center for Toxicology and Environmental Health University of Southern Maine, 478 Science Building, 96 Falmouth Street Portland, MA 04104–9300, has applied in due form for a permit to receive, import, and export marine mammal and sea turtle biological samples for scientific research purposes.

DATES: Written, telefaxed, or email comments must be received on or before December 7, 2011.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 16305 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices: See **SUPPLEMENTARY INFORMATION**.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include File No. 16305 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Jennifer Skidmore, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

The objectives of the proposed research are to receive, import, and export tissue samples from marine mammals and sea turtles under NMFS jurisdiction to: (1) Determine tissue levels of metals and other environmental contaminants; and (2) establish a resource of marine mammal and sea turtle cell lines for use as model systems in the investigation of various factors related to marine mammal health and as comparative tools to human studies (toxicity of metals, virology, etc.). When available, frozen and formalin-fixed tissues would be received from the same animals from which cell lines are derived. The applicant proposes to use frozen tissues for contaminant and DNA analysis, and formalin-fixed tissues for pathological studies.

The numbers of animals, by species, from which samples may be received, imported, or exported annually include: 270 sperm whale (*Physeter macrocephalus*), 30 blue whale (*Balaenoptera musculus*), 30 Bryde's whale (*B. edeni*), 30 dwarf sperm whale (*Kogia sima*), 30 false killer whale (*Pseudorca crassidens*), 30 fin whale (*B. physalus*), 30 gray whale (*Eschrichtius robustus*), 30 humpback whale (*Megaptera novaeangliae*), 30 killer whale (*Orcinus orca*), 30 minke whale (*B. acutorostrata*), 60 pilot whale (*Globicephala* spp.), 30 pygmy sperm whale (*K. breviceps*), 30 sei whale (*B. borealis*), 30 southern right whale (*Eubalaena australis*), 30 northern right whale (*E. glacialis*), 30 beaked whales (Cuvier's beaked, *Ziphius cavirostris,* and other beaked whales, *Mesoplodon* spp.), and 30 common dolphins (*Delphinus delphis*). In addition, samples from up to 10 animals from each of the following species may be received, imported, or exported annually: All other cetacean species, all pinnipeds (excluding walrus), and all sea turtles.

No take would be involved; tissues would be received from the following sources: Stranded animals; animals that die during rehabilitation attempts; animals that die in public display or captive research facilities; animals sampled by other permitted researchers; and animals killed during legal subsistence hunts. Once the cell lines are established, they may be transferred to other researchers for scientific research, including export to world-wide locations. The cell lines would not be sold for profit or used for commercial purposes.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Documents may be reviewed in the following locations:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; *phone* (301) 427–8401; *fax* (301) 713–0376;

Northwest Region, NMFS, 7600 Sand Point Way NE., BIN C15700, Bldg. 1, Seattle, WA 98115–0700; *phone* (206) 526–6150; *fax* (206) 526–6426;

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; *phone* (907) 586–7221; *fax* (907) 586–7249;

Southwest Region, NMFS, 501 West Ocean Blvd. Suite 4200, Long Beach, CA 90802–4213; *phone* (562) 980–4001; *fax* (562) 980–4018;

Pacific Islands Region, NMFS, 1601 Kapiolani Blvd. Rm. 1110, Honolulu, HI 96814–4700; *phone* (808) 944–2200; *fax* (808) 973–2941;

Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; *phone* (978) 281–9328; *fax* (978) 281–9394; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, FL 33701; *phone* (727) 824–5312; *fax* (727) 824–5309.

Dated: November 1, 2011.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–28771 Filed 11–4–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA810

Mid-Atlantic Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (Council) Scientific and Statistical Committee (SSC) will hold a public meeting.

DATES: The meeting will be held on Monday, December 5, 2011, from 1 p.m. to 5 p.m.

ADDRESSES: The meeting will be held via webinar with a telephone-only connection option. Details on webinar registration and the telephone-only connection details are available at: *http://www.mafmc.org.*

Council address: Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331, extension 255.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to reconsider the 2012 ABC recommendations made to the Council for summer flounder and scup based on updated stock assessment information recently provided for both species by the Northeast Fisheries Science Center. Information about accessing the webinar can be obtained by visiting the Council's Web site at *www.mafmc.org.*

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: November 1, 2011.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2011–28659 Filed 11–4–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA806

Marine Mammals; File No. 16553

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that a permit has been issued to Brent Stewart, Ph.D., J.D., Hubbs SeaWorld Research Institute, 2595 Ingraham Street, San Diego, CA 92109 to conduct research on California sea lions (*Zalophus californianus*), northern elephant seals (*Mirounga angustirostris*), and harbor seals (*Phoca vitulina*).

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; *phone* (301) 427–8401; *fax* (301) 713–0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; *phone* (562) 980–4001; *fax* (562) 980–4018.

FOR FURTHER INFORMATION CONTACT: Carrie Hubard or Amy Sloan, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On August 17, 2011, notice was published in the **Federal Register** (76 FR 51002) that a request for a permit to conduct research on three pinniped species had been submitted by the above-named applicant. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

Permit No. 16553 authorizes Dr. Stewart to continue a long term study on the comparative ecology, demography, community ecology, foraging patterns, pathology and phenology of pinniped species in California and to further characterize the resources and habitats used by each species. California sea lions, northern elephant seals, and harbor seals may be captured and sampled at several sites: San Nicolas Island, San Miguel Island, Santa Rosa Island, Santa Cruz Island, Piedras Blancas, Cape San Martin, and Gorda. Some animals will only receive a flipper tag or a dye mark. Other animals may be physically or chemically restrained; measured and weighed; have a variety of samples taken, including: Blood, skin, blubber, and mucus membrane swabs; and have tracking or data recording instruments attached. The permit also authorizes up to four unintentional research-related mortalities of each species annually. The permit is valid through October 31, 2016.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: November 1, 2011.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–28768 Filed 11–4–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XT82

Marine Mammals; File No. 14676

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application for permit amendment.

SUMMARY: Notice is hereby given that Paul Ponganis, Ph.D., University of California at San Diego, La Jolla, CA, has applied for an amendment to Scientific Research Permit No. 14676.

DATES: Written, telefaxed, or email comments must be received on or before December 7, 2011.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the *Features* box on the Applications and Permits for Protected Species home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 14676 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; *phone* (301) 427–8401; *fax* (301) 713–0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; *phone* (562) 980–4001; *fax* (562) 980–4018.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Tammy Adams or Amy Sloan, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject amendment to Permit No. 14676 is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

Permit No. 14676, issued on January 13, 2010 (75 FR 4046), authorizes the permit holder to capture up to 10 California sea lions (*Zalophus californianus*) annually on San Nicolas Island off the coast of California for attachment and retrieval of instruments to study the role of blood oxygen store depletion in the dive behavior and foraging ecology of California sea lions. The permit also authorizes harassment of up to 6,000 California sea lions, 500 harbor seals (*Phoca vitulina*), 1,000 northern elephant seals (*Mirounga angustirostris*), and 150 northern fur seals (*Callorhinus ursinus*) annually incidental to the capture operations. The permit is valid until February 1, 2015.

The permit holder is requesting the permit be amended to include authorization for an additional procedure, deployment of a heart rate/stroke rate recorder, on up to 30 animals over the two field seasons. For this procedure, the holder requests permission to capture an additional 5 animals per year, for a total of 15 per year. The amendment would be valid through the expiration date of the original permit. The objective of this additional procedure is to further investigate the relationship of heart rate and flipper stroke rate patterns to the arterial and venous blood oxygen profiles during deep versus shallow dives.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: November 2, 2011.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–28780 Filed 11–4–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA507

Takes of Marine Mammals Incidental to Specified Activities; Low-Energy Marine Geophysical Survey in the Western Tropical Pacific Ocean, November to December 2011

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of an incidental take authorization (ITA).

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) regulation, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to Scripps Institution of Oceanography (SIO) to take marine mammals, by Level B harassment, incidental to conducting a low-energy marine geophysical (i.e., seismic) survey in the western tropical Pacific Ocean, November to December 2011.

DATES: Effective November 5, 2011 through January 31, 2012.

ADDRESSES: A copy of the IHA and application are available by writing to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910 or by telephoning the contacts listed here.

A copy of the IHA application containing a list of the references used in this document may be obtained by writing to the above address, telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**) or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

The following associated documents are also available at the same Internet address: ''Environmental Assessment Pursuant to the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.* and Executive Order 12114, Marine Geophysical Survey by the R/V *Thompson* in the western tropical Pacific Ocean, November-December 2011 (EA)'' prepared by the National Science Foundation (NSF), and ''Environmental Assessment of a Low-Energy Marine Geophysical Survey by the R/V *Thompson* in the Western Tropical Pacific Ocean, November-December 2011,'' prepared by LGL Ltd., Environmental Research Associates (LGL), on behalf of NSF. The NMFS Biological Opinion will be available online at: *http://www.nmfs.noaa.gov/pr/consultation/opinions.htm.* Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(D) of the MMPA (16 U.S.C. 1371(a)(5)(D)) directs the Secretary of Commerce (Secretary) to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice

of a proposed authorization is provided to the public for review.

Authorization for the incidental taking of small numbers of marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring and reporting of such takings. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS' review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

NMFS received an application on June 14, 2011, from SIO for the taking by harassment, of marine mammals, incidental to conducting a low-energy marine seismic survey in the western tropical Pacific Ocean. SIO, a part of the University of California San Diego, in collaboration with University of Washington (UW), Woods Hole Oceanographic Institution (WHOI), Texas A&M University (TAMU), and Kutztown University, plans to conduct a magnetic and seismic study of the Hawaiian Jurassic crust onboard an oceanographic research vessel in the western tropical Pacific Ocean north of the Marshall Islands for approximately 32 days. The survey will use a pair of Generator Injector (GI) airguns each with a discharge volume of 105 cubic inches (in^3). SIO plans to conduct the survey from approximately November 5 to December 17, 2011. The seismic survey will be conducted partly in international waters and partly in the Exclusive Economic Zone (EEZ) of Wake Island (U.S.), and possibly in the EEZ of the Republic of the Marshall Islands. On July 29, 2011, NMFS published a notice in the **Federal Register** (76 FR 45518) making preliminary determinations and proposing to issue an IHA. The notice initiated a 30-day public comment period.

SIO plans to use one source vessel, the R/V *Thomas G. Thompson* (*Thompson*) and a seismic airgun array to collect seismic reflection and refraction profiles from the Hawaiian Jurassic crust in the western tropical Pacific Ocean. In addition to the operations of the seismic airgun array, SIO intends to operate a multibeam echosounder (MBES) and a sub-bottom profiler (SBP) continuously throughout the survey.

Acoustic stimuli (i.e., increased underwater sound) generated during the operation of the seismic airgun array may have the potential to cause a short-term behavioral disturbance for marine mammals in the survey area. This is the principal means of marine mammal taking associated with these activities and SIO has requested an authorization to take 19 species of marine mammals by Level B harassment. Take is not expected to result from the use of the MBES or SBP, for reasons discussed in this notice; nor is take expected to result from collision with the vessel because it is a single vessel moving at a relatively slow speed during seismic acquisition within the survey, for a relatively short period of time (approximately 39 days). It is likely that any marine mammal would be able to avoid the vessel.

Description of the Specified Activity

SIO's planned seismic survey in the western tropical Pacific Ocean, as part of an integrated magnetic and seismic study of the Hawaiian Jurassic crust, will take place for approximately 32 days in November to December 2011 (see Figure 1 of the IHA application). The seismic survey will take place in water depths ranging from approximately 2,000 to 6,000 meters (m) (6,561.7 to 19,685 feet [ft]) and consist of approximately 1,600 kilometers (km) (863.9 nautical miles [nmi]) of transect lines in the study area. The survey will take place in the area 13° to 23° North, 158° to 172° East, just north of the Marshall Islands. The project is scheduled to occur from approximately November 5 to December 17, 2011. Some minor deviation from these dates is possible, depending on logistics and weather.

The goal of the research is to define the global nature and significance of variations in intensity and direction of the Earth's magnetic field during the Jurassic time period (approximately 145 to 180 million years ago), which appears to have been a period of sustained low intensity and rapid directional changes or polarity reversals compared to other periods in Earth's magnetic field history. Access to Jurassic-aged crust with good magnetic signals is very limited, with the best continuous records in ocean crust, but only one area of the ocean floor has been measured to date: The western Pacific Japanese magnetic lineations. To properly assess the global significance of the variations and to eliminate local crustal and tectonic complications, it is necessary to measure Jurassic magnetic signals in a different area of the world. The study will attempt to verify the unusual behavior of the Jurassic geomagnetic field and test whether it was behaving in a globally coherent way by conducting a near-bottom marine magnetic field survey of Pacific Hawaiian Jurassic crust located between Hawaii and Guam.

Widespread, younger, Cretaceous-aged (65 to 140 million years ago) volcanism overprinted much of the western Pacific, so it is important to know the extent of Cretaceous-aged volcanic crust. This will be assessed by carrying out a seismic reflection and refraction survey of the Hawaiian Jurassic crust. First, the autonomous underwater vehicle (AUV) *Sentry* and a simultaneously deployed deep-towed magnetometer system will acquire two parallel profiles of the near-bottom crustal magnetic field 10 km (5.4 nmi) apart and approximately 800 km (432 nmi) long. More information on the AUV *Sentry* is available at *http://www.whoi.edu/page.do?pid=38098*. Second, the seismic survey will be conducted using airguns, a hydrophone streamer, and sonobuoys directly over the same profile as the AUV magnetic survey.

The survey will involve one source vessel, the *Thompson*. For the seismic component of the research program, the *Thompson* will deploy an array of two low-energy Sercel Generator Injector

(GI) airguns as an energy source (each with a discharge volume of 105 in^3) at a tow depth of 3 m (9.8 ft). The acoustic receiving system will consist of an 800 m (2,624.7 ft), 48 channel hydrophone streamer and directional, passive sonobuoys. Over the course of the seismic operations, 50 Ultra Electronics AN/SSQ–53D(3) directional, passive sonobuoys will be deployed from the vessel. The sonobuoys consist of a hydrophone, electronics, and a radio transmitter. As the airgun is towed along the survey lines, the hydrophone streamer and sonobuoys will receive the returning acoustic signals and transfer the data to the on-board processing system. The seismic signal is measured by the sonobuoy's hydrophone and transmitted by radio back to the source vessel. The sonobuoys are expendable, and after a pre-determined time (usually eight hours), they self-scuttle and sink to the ocean bottom.

The survey lines will be within the area enclosed by red lines in Figure 1 of the IHA application, but the exact locations of the survey lines will be determined during transit after observing the location of the appropriate magnetic lineation by surface-towed magnetometer. Magnetic and seismic data acquisition will alternate on a daily basis; seismic surveys will take place while the AUV used to collect magnetic data is on deck to recharge its batteries. In addition to the operations of the airgun array, a Kongsberg EM300 MBES and ODEC Bathy-2000 SBP will also be operated from the *Thompson* continuously throughout the cruise. There will be additional seismic operations associated with equipment testing, start-up, and possible line changes or repeat coverage of any areas where initial data quality is sub-standard. In SIO's calculations, 25% has been added for those contingency operations.

All planned geophysical data acquisition activities will be conducted by technicians provided by SIO, with on-board assistance by the scientists who have planned the study. The Principal Investigators are Drs. Masako Tominaga, Maurice A. Tivey, Daniel Lizarralde of WHOI, William W. Sager of TAMU, and Adrienne Oakley of Kutztown University. The vessel will be self-contained, and the crew will live aboard the vessel for the entire cruise.

Description of the Dates, Duration, and Specified Geographic Region

The *Thompson* is expected to depart Honolulu, Hawaii, on November 5, 2011 and spend approximately 7 days in transit to the survey area, 32 days alternating between acquiring magnetic and seismic data, and approximately 3 days in transit, arriving at Apra Harbor, Guam, on December 17, 2011. Seismic operations will be conducted for a total of approximately 16 days. Some minor deviation from this schedule is possible, depending on logistics and weather. The survey will encompass the area approximately 13° to 23° North, approximately 158° to 172° East, just north of the Marshall Islands (see Figure 1 of the IHA application). Water depths in the survey area generally range from approximately 2,000 to 6,000 m (6,561.7 to 19,685 ft); Wake Island is included in the survey area. The seismic survey will be conducted partly in international waters and partly in the EEZ of Wake Island (U.S.), and possibly in the EEZ of the Republic of the Marshall Islands.

NMFS outlined the purpose of the program in a previous notice for the proposed IHA (76 FR 45518, July 29, 2011). The activities to be conducted have not changed between the proposed IHA notice and this final notice announcing the issuance of the IHA. For a more detailed description of the authorized action, including vessel and acoustic source specifications, the reader should refer to the proposed IHA notice (76 FR 45518, July 29, 2011), the IHA application, EA, and associated documents referenced above this section.

Comments and Responses

A notice of proposed IHA for the SIO seismic survey was published in the **Federal Register** on July 29, 2011 (76 FR 45518). During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission) and approximately 72 private citizens. Several of the private citizens' comments were non-substantive and/or opposed the issuance of an IHA without providing any specific rationale for that position. NMFS, therefore, is not providing a substantive response to those comments. The Commission's and private citizens' comments are online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Following are their substantive comments and NMFS's response:

Comment 1: The Commission recommends that NMFS require SIO to re-estimate the proposed exclusion and buffer zones for the two airgun array and associated numbers of marine mammal takes using operational and site-specific environmental parameters. If the exclusion zones (EZ) and buffer zones are not re-estimated for the two airgun array, require SIO to provide a detailed justification for basing the EZs and buffer zones for the proposed survey in the western tropical Pacific Ocean on modeling that relies on measurements from the GOM.

Response: NMFS is satisfied that the data supplied are sufficient for NMFS to conduct its analysis and make any determinations and therefore no further effort is needed by the applicant. While exposures of marine mammals to acoustic stimuli are difficult to estimate, NMFS is confident that the levels of take provided by SIO in their IHA application and EA, and authorized herein are estimated based upon the best available scientific information and estimation methodology.

Received sound levels have been modeled by L–DEO for a number of airgun configurations, including two 105 in^3 (210 in^3 total volume) GI airguns, in relation to distance and direction from the airguns (see Figure 2 of the IHA application). The model does not allow for bottom interactions, and is most directly applicable to deep water. Based on the modeling, estimates of the maximum distances from the source where sound levels are predicted to be 190, 180, and 160 dB re 1 μPa (rms) in deep water were determined (see Table 3 below).

Empirical data concerning the 190, 180, and 160 dB (rms) distances were acquired for various airgun arrays based on measurements during the acoustic verification studies conducted by L–DEO in the northern GOM in 2003 (Tolstoy *et al.,* 2004) and 2007 to 2008 (Tolstoy *et al.,* 2009). Results of the 36 airgun array are not relevant for the two GI airguns to be used in the survey. The empirical data for the 6, 10, 12, and 20 airgun arrays indicate that, for deep water, the L–DEO model tends to overestimate the received sound levels at a given distance (Tolstoy *et al.,* 2004). Measurements were not made for the two GI airgun array in deep water, however, SIO proposes to use the EZ predicted by L–DEO's model for the GI airgun operations in deep water, although they are likely conservative given the empirical results for the other arrays.

NMFS is confident in the peer-reviewed results of L–DEO's seismic calibration studies, which although viewed as conservative, were used to determine the sound radii for the mitigation airgun for this cruise and which factor into exposure estimates. NMFS had determined that these reviews are the best scientific data available for review of the IHA application and to support the necessary analyses and determinations under the MMPA, Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*), and NEPA. Further, the 160 dB (i.e., buffer)

zone used to estimate exposure is appropriate and sufficient for purposes of supporting NMFS's analysis and determinations required under section 101(a)(5)(D) of the MMPA and its implementing regulations.

Although, the L–DEO model does not account for site-specific environmental conditions, sound propagation varies notably less between deep water sites than it would between shallow water sites (because of the reduced significance of bottom interaction), thus decreasing the importance of deep water site-specific estimates, such as in this seismic survey. Further, the calibration study of the L–DEO model predicted that using site-specific information may actually provide less conservative EZs at greater distances. At this point in time, the alternative method of conducing site-specific attenuation measurements in the water depths that the survey is to be conducted is neither warranted nor practical for the applicant, both logistically and financially. Should the applicant endeavor to undertake a sound source verification study in the future, confidence in the results is necessary to ensure that appropriate monitoring and mitigation measures are implemented; therefore inappropriate or poorly executed efforts should be avoided and discouraged.

Based on NMFS's analysis of the likely effects of the specified activity on marine mammals and their habitat, NMFS has determined that the EZs identified in the IHA are appropriate for the survey and that additional field measurement is not necessary at this time. While exposures of marine mammals to acoustic stimuli are difficult to estimate, NMFS is confident that the levels of take authorized herein are estimated based upon the best available scientific information and estimation methodology. The 160 dB zone used to estimate exposure is appropriate and sufficient for purposes of supporting NMFS's analysis and determinations required under section 101(a)(5)(D) of the MMPA and its implementing regulations. The IHA issued to SIO provides monitoring and mitigation requirements to protect marine mammals from injury (Level A harassment), serious injury, or mortality. SIO is required to comply with the IHA's requirements.

Comment 2: The Commission recommends that NMFS require SIO to use operational and site-specific environmental parameters to estimate the EZ, buffer zone, and number of marine mammal takes associated with use of the SBP and to incorporate those EZ and buffer zones into the same type of mitigation and monitoring measures for the SBP as are proposed for the two airgun array.

Response: The notice of the proposed IHA included a discussion of the acoustic source specifications and the potential effect of the MBES and SBP. The MBES and SBP have anticipated radii of influence significantly less than that for the airgun array. The 160 dB (rms) and 180 dB (rms) isopleths of the MBES and SBP are very small and the acoustic beams are very narrow, making the duration of the exposure and the potential for taking marine mammals by Level B harassment small to non-existent. NMFS believes that it is unlikely that marine mammals would be affected by SBP signals whether operating alone or in conjunction with other acoustic devices, since the animals would need to swim adjacent to the vessel or directly under the vessel. Therefore, operation of the SBP does not warrant take requests, or consultation, under the MMPA. SIO will already be monitoring and mitigating the EZ for the two airgun array which would encompass the small EZ for the SBP, therefore it is not logical to use sparse agency resources to perform additional, unwarranted modeling.

Comment 3: The Commission recommends that NMFS condition the IHA to prohibit a 15 min pause and require a longer pause before ramping-up after a power-down or shut-down of the airguns, based on the presence of a mysticete or large odontocete in the EZ and the *Thompson's* movement (speed and direction).

Response: Although power-down procedures are often standard operating practice for seismic surveys, power-downs from two airguns to one airgun will not be implemented as a mitigation measure for this particular seismic survey, as it will only make a small difference in the 180 or 190 dB (rms) radius—probably not enough to allow continued single airgun operations if a marine mammal came within the EZ for two airguns.

During periods of active seismic operations, there are occasions when the airguns need to be temporarily shut-down (for example due to equipment failure, maintenance, or shut-down). In these instances, should the airguns be inactive for more than 15 min, then SIO would follow the ramp-up procedures identified in the ''Mitigation'' section of this document (see below) and IHA where airguns will be re-started beginning with a single GI airgun (105 in^3) and the second GI airgun (105 in^3) will be added after five min. The extended period of 15 min before ramping-up after a shut-down of the airguns is operationally motivated. Protected Species Observers (PSOs) are primarily concerned with marine mammals entering the EZs. However, their visual observations go to the horizon or as far as they can practically watch. The horizon is approximately 6 nmi at the height of the PSOs watch station. The planned survey speed for the cruise is 5 knots; the ship would move 2.3 km (1.25 nmi) in 15 min, or roughly ⅕ the distance to the horizon. An alert PSO should be able to say with a reasonable degree of confidence whether a marine mammal would be encountered within this distance. Thus, a routine ramp-up within 15 min and with the PSO on watch should pose little risk to marine mammals.

Operationally, it would take 15 min or longer to locate the second PSO and get him or her into position on the ship's deck to monitor for the initial ramp-up procedure or 30 min of observation by two PSOs prior to energizing the sound source; thus, the use of an extended shut-down period of 15 min before requiring an initial ramp-up procedure.

Comment 4: The Commission recommends that NMFS extend the 30 min monitoring period following a marine mammal sighting in the EZ to cover the full dive times of all species likely to be encountered.

Response: NMFS recognizes that several species of deep-diving cetaceans are capable of remaining underwater for more than 30 min (e.g., sperm whales, Cuvier's beaked whales, Longman's beaked whales, Blainville's beaked whales, and Ginkgo-toothed beaked whales); however, for the following reasons NMFS believes that 30 min is an adequate length for the monitoring period prior to the ramp-up of airguns:

(1) Because the *Thompson* is required to monitor before ramp-up of the airgun array, the time of monitoring prior to the start-up of the two GI airgun array is effectively longer than 30 min (ramp-up will begin with one airgun and the second airgun will be added five min later);

(2) In many cases PSOs are observing during times when SIO is not operating the seismic airguns and would observe the area prior to the 30-min observation period;

(3) The majority of the species that may be exposed do not stay underwater more than 30 min; and

(4) All else being equal and if deep-diving individuals happened to be in the area in the short time immediately prior to the pre-ramp-up monitoring, if an animal's maximum underwater dive time is 45 min, then there is only a one in three chance that the last random surfacing would occur prior to the beginning of the required 30 min

monitoring period and that the animal would not be seen during that 30 min period.

Finally, seismic vessels are moving continuously (because of the long, towed array and streamer) and NMFS believes that unless the animal submerges and follows at the speed of the vessel (highly unlikely, especially when considering that a significant part of their movement is vertical [deep-diving]), the vessel will be far beyond the length of the EZ within 30 min, and therefore it will be safe to start the airguns again.

The effectiveness of monitoring is science-based, and monitoring and mitigation measures must be ''practicable.'' NMFS believes that the framework for visual monitoring will: (1) Be effective at spotting almost all species for which take is requested; and (2) that imposing additional requirements, such as those suggested by the Commission, would not meaningfully increase the effectiveness of observing marine mammals approaching or entering the EZs and thus further minimize the potential for take.

Comment 5: The Commission recommends that NMFS condition the IHA to require SIO to monitor, document, and report observations during all ramp-up procedures.

Response: The IHA requires that PSOs on the *Thompson* make observations for 30 min prior to ramp-up, during all ramp-ups, and during all daytime seismic operations and record the following information when a marine mammal is sighted:

(i) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from the seismic vessel, sighting cue, apparent reaction of the airguns or vessel (e.g., none, avoidance, approach, paralleling, etc., and including responses to ramp-up), and behavioral pace; and

(ii) Time, location, heading, speed, activity of the vessel (including number of airguns operating and whether in state of ramp-up or shut-down), Beaufort wind force and sea state, visibility, and sun glare.

Comment 6: The Commission recommends that NMFS work with NSF to analyze data on ramp-up procedures to help determine the effectiveness of those procedures as a mitigation measure for geophysical surveys after the data are compiled and quality control measures have been completed.

Response: One of the primary purposes of monitoring is to result in ''increased knowledge of the species'' and the effectiveness of required monitoring and mitigation measures; the effectiveness of ramp-up as a mitigation measure and marine mammal reaction to ramp-up would be useful information in this regard. NMFS has asked NSF and SIO to gather all data that could potentially provide information regarding the effectiveness of ramp-up as a mitigation measures. However, considering the low numbers of marine mammal sightings and low numbers of ramp-ups, it is unlikely that the information will result in any statistically robust conclusions for this particular seismic survey. Over the long term, these requirements may provide information regarding the effectiveness of ramp-up as a mitigation measure, provided animals are detected during ramp-up.

Comment 7: Numerous private citizens state that NMFS's proposed IHA for the take, by Level B harassment, of 19 species of marine mammals incidental to SIO's low-energy seismic survey in the western tropical Pacific Ocean is extremely negligent and disturbing considering today's knowledge about the impact sound has on ocean inhabitants, and particularly marine mammals like whales and dolphins. One private citizen interested in marine mammal and seismic issues stated many of the potential threats and impacts (i.e., avoidance, fleeing important habitat, stress, shifts in migration routes, other forms of behavioral responses, and physical damage) from seismic exploration (for scientific research or oil and gas purposes) to marine mammals as well as to cephalopods, crustaceans, sea turtles, and fishing. The private citizen also noted the lack of knowledge and difficulties in studying the biology of marine mammals and estimating the impacts of noise on these animals.

Last year, NMFS issued Letters of Authorization (LOAs) to the U.S. Navy for the incidental take of millions of marine mammals. Since these LOAs were issued, multiple stranding incidents of marine mammals have occurred along U.S. coastlines due to explosives, sonar, and now this seismic survey. There have been other incidents in this area that have not been made public and others that are undocumented.

In addition to this specified activity, the cetaceans of the western tropical Pacific Ocean are impacted from explosives, sonar, pollution, fishing nets and trawls, ship collisions, noise produced by ships, and other scientific and military activities. Whales and dolphins, many species which are already endangered, are essential to the oceans biodiversity, health, and safety. Also, sound pollution should start being reduced as it contaminates the ocean and interferes with the ability of sea creatures to persist. Leading scientific research institutions, such as SIO, should be aware of information regarding the current and increasing anthropogenic impacts upon ocean ecosystems. The private citizens oppose the issuance of an IHA to SIO for conducting a low-energy marine seismic survey in the western tropical Pacific Ocean. One private citizen states that NOAA must prevent by denial, all applications that cause intrusive sound waves into an already confusing and damaging array of anthropogenic created wave forms.

Response: As noted above, the purpose of the seismic survey is to support research activities to define the global nature and significance of variations in intensity and direction of the Earth's magnetic field during the Jurassic time period (approximately 145 to 180 million years ago), which appears to have been a period of sustained low intensity and rapid directional changes or polarity reversals compared to other period in Earth's magnetic field history. SIO's seismic survey is neither oil and gas-related exploration nor a military readiness activity.

Although several commenter's cited many of the potential negative aspects of the introduction of anthropogenic sound in the marine environment, specific issues related to the content of this IHA request were not necessarily made and therefore proves challenging for NMFS to provide a response. The notice of the proposed IHA (76 FR 45518, July 29, 2011) included a discussion of the effects of sounds from airguns on mysticetes, odontocetes, and pinnipeds including tolerance, masking, behavioral disturbance, hearing impairment, and other non-auditory physical effects. Also, NMFS included a detailed discussion of the potential effects of this action on marine mammal habitat, including physiological and behavioral effects on marine fish, fisheries, and invertebrates. While NMFS anticipates that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification, this impact to habitat is temporary and reversible which NMFS considered in further detail in the notice of the proposed IHA (76 FR 45518, July 29, 2011) as behavioral modification. The main impact associated with the activity would be temporarily elevated noise levels and the associated direct effects on marine mammals. NMFS refers the reader to SIO's application and EA for additional information on

the potential behavioral reactions (or lack thereof) by all types of marine mammals to seismic research activities.

The U.S. Navy's training operations are considered military readiness activities. The National Defense Authorization Act of 2004 (NDAA) (Pub. L. 108–36) modified the MMPA by removing the ''small numbers'' and ''specified geographic region'' limitations and amended the definition of ''harassment'' as it applies to a ''military readiness activity.'' NMFS is unaware of marine mammal strandings along U.S. coastlines since these LOAs were issued that have been directly associated with to the U.S. Navy's use of sonar or from seismic airguns operated by academic institutions. NMFS's Marine Mammal Health and Stranding Response Program responds to marine mammals that have stranded along the U.S. coastline and assesses trends in marine mammal health and how these trends correlate with environmental data.

To meet NEPA requirements, NSF prepared an ''Environmental Assessment Pursuant to the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.* and Executive Order 12114, Marine Geophysical Survey by the R/V *Thompson* in the western tropical Pacific Ocean, November-December 2011,'' which incorporated an ''Environmental Assessment of a Low-Energy marine Geophysical Survey by the R/V *Thompson* in the Western Tropical Pacific Ocean, November-December 2011,'' prepared by LGL, which included an analysis on the cumulative impacts on the environment that result from a combination of past, existing, and reasonably foreseeable projects and human activities. Human activities in and near the survey area include commercial vessel traffic (including collisions with vessels and vessel noise), U.S. military training exercises, commercial fishing (entanglement in fishing gear), and coastal development associated with military requirements.

Generally, under the MMPA, NMFS shall authorize the harassment of small numbers of marine mammals incidental to an otherwise lawful activity, provided NMFS finds that the taking will have a negligible impact on the species or stock, will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth to achieve the least practicable adverse impact. SIO has applied for an IHA and has met the necessary requirements for issuance of an IHA for small numbers of marine mammals, by Level B harassment, incidental to the low-energy marine seismic survey in the western tropical Pacific Ocean.

No injuries, serious injuries, or mortalities are anticipated to occur as a result of SIO's planned low-energy marine seismic survey in the western tropical Pacific Ocean, and none are authorized by NMFS in IHA issued to SIO. Only short-term, behavioral disturbance is anticipated to occur due to the brief and sporadic duration of the survey activities. NMFS has determined, provided that the mitigation and monitoring measures described below are implemented, that the impact of conducting a marine seismic survey in the western tropical Pacific Ocean, November to December, 2011, may result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of small numbers of certain species of marine mammals.

Based on the analysis contained in the IHA application, notice of the proposed IHA (76 FR 45518, July 29, 2011), and this document, of the likely effects of the specified activity on marine mammals and their habitat, which is based on the best scientific information available, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that SIO's planned research activities, will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the marine seismic survey will have a negligible impact on the affected species or stocks of marine mammals; and that impacts to affected species or stocks of marine mammals have been mitigated to the lowest level practicable. Therefore, NMFS shall issue the IHA to SIO.

Description of the Marine Mammals in the Area of the Specified Activity

Twenty-six marine mammal species (19 odontocetes, 6 mysticetes, and one pinniped) are known to or could occur in the Marshall Islands Marine Eco-region (MIME) study area. Several of these species are listed as endangered under the U.S. Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*), including the humpback (*Megaptera novaeangliae*), sei (*Balaenoptera borealis*), fin (*Balaenoptera physalus*), blue (*Balaenoptera musculus*), and sperm (*Physeter macrocephalus*) whales, as well as the Hawaiian monk seal (*Monachus schauinslandi*). The North Pacific right whale (*Eubalaena japonica*), listed as endangered under the ESA, was historically distributed throughout the North Pacific Ocean north of 35° North and occasionally occurred as far south as 20° North. Whaling records indicate that the MIME was not part of its range (Townsend, 1935).

The dugong (*Dugong dugon*), also listed as endangered under the ESA, is distributed in shallow coastal waters throughout most of the Indo-Pacific region between approximately 27° North and South of the equator (Marsh, 2008). Its historical range extended to the Marshall Islands (Nair *et al.,* 1975). However, the dugong is declining or extinct in at least one third of its range and no longer occurs in the MIME (Marsh, 2008). The dugong is managed by the U.S. Fish and Wildlife Service (USFWS) and is not considered further in this analysis; all others are managed by NMFS.

The marine mammals that occur in the survey area belong to three taxonomic groups: Odontocetes (toothed cetaceans, such as dolphins), mysticetes (baleen whales), and pinnipeds (seals, sea lions, and walrus). Cetaceans are the subject of the IHA application to NMFS.

Table 1 (below) presents information on the abundance, distribution, population status, conservation status, and density of the marine mammals that may occur in the survey area during November to December 2011.

TABLE 1—THE HABITAT, REGIONAL ABUNDANCE, AND CONSERVATION STATUS OF MARINE MAMMALS THAT MAY OCCUR IN OR NEAR THE SEISMIC SURVEY AREA IN THE WESTERN TROPICAL PACIFIC OCEAN

[See text and Tables 2 to 3 in SIO's application for further details]

Species	Habitat	Regional abundance [4]	ESA [1]	MMPA [2]	Density (#/1,000 km^2) CNMI, Hawaii, and mean [3]
Mysticetes:					

TABLE 1—THE HABITAT, REGIONAL ABUNDANCE, AND CONSERVATION STATUS OF MARINE MAMMALS THAT MAY OCCUR IN OR NEAR THE SEISMIC SURVEY AREA IN THE WESTERN TROPICAL PACIFIC OCEAN—Continued

[See text and Tables 2 to 3 in SIO's application for further details]

Species	Habitat	Regional abundance [4]	ESA [1]	MMPA [2]	Density (#/1,000 km^2) CNMI, Hawaii, and mean [3]
Humpback whale (*Megaptera novaeangliae*).	Mainly nearshore, banks.	20,800 [5]	EN	D	0 0 0
Minke whale (*Balaenoptera acutorostrata*).	Pelagic and coastal	25,000 [6]	NL	NC	0 0 0
Bryde's whale (*Balaenoptera edeni*)	Pelagic and coastal	20,000 to 30,000	NL	NC	0.41 0.21 0.3
Sei whale (*Balaenoptera borealis*)	Primarily offshore, pelagic.	7,260 to 12,620 [9]	EN	D	0.29 0 0.13
Fin whale (*Balaenoptera physalus*)	Continental slope, pelagic.	13,620 to 18,680 [9]	EN	D	0 0 0
Blue whale (*Balaneoptera musculus*)	Pelagic, shelf, coastal	NA	EN	D	0 0 0
Odontocetes:					
Sperm whale (*Physeter macrocephalus*)	Pelagic, deep sea	29,674 [10]	EN	D	1.23 3.03 2.22
Pygmy sperm whale (*Kogia breviceps*)	Deep waters off the shelf.	NA	NL	NC	0 3.19 1.76
Dwarf sperm whale (*Kogia sima*)	Deep waters off the shelf.	11,200	NL	NC	0 7.82 4.30
Cuvier's beaked whale (*Ziphius cavirostris*).	Pelagic	20,000	NL	NC	0 6.80 3.74
Longman's beaked whale (*Indopacetus pacificus*).	Deep water	NA	NL	NC	0 0.45 0.25
Blainville's beaked whale (*Mesoplodon densirostris*).	Pelagic	25,300 [11]	NL	NC	0 1.28 0.7
Ginkgo-toothed beaked whale (*Mesoplodon ginkgodens*).	Pelagic	NA	NL	NC	0 0 0
Rough-toothed dolphin (*Steno bredanensis*).	Deep water	146,000	NL	NC	0.29 3.12 1.85
Bottlenose dolphin (*Tursiops truncatus*)	Coastal, oceanic, shelf break.	243,500	NL	NC D—Western North Atlantic coastal	0.21 1.23 0.77
Pantropical spotted dolphin (*Stenella attenuata*).	Coastal and pelagic	800,000 [12]	NL	NC D (Northeastern offshore)	22.6 2.10 11.32
Spinner dolphin (*Stenella longirostris*)	Coastal and pelagic	800,000 [13]	NL	NC D—Eastern	3.14 0.83 1.87
Striped dolphin (*Stenella coeruleoalba*)	Off continental shelf	1,000,000 [14]	NL	NC	6.16 5.57 5.84
Fraser's dolphin (*Lagenodelphis hosei*)	Deep water	289,000	NL	NC	0 4.57 2.51
Risso's dolphin (*Grampus griseus*)	Deep water, seamounts.	175,000	NL	NC	0 0.83 0.46
Melon-headed whale (*Peponocephala electra*).	Oceanic	45,000	NL	NC	4.28 1.32 2.67
Pygmy killer whale (*Feresa attenuata*)	Deep, pantropical waters.	39,000	NL	NC	0.14 0 0.06
False killer whale (*Pseudorca crassidens*).	Pelagic	40,000	NL Proposed EN—insular Hawaiian	NC	1.11 0.11 0.57
Killer whale (*Orcinus orca*)	Pelagic, shelf, coastal	8,500	NL EN—Southern resident)	NC D—Southern resident, AT1 transient	0 0.16 0.09

TABLE 1—THE HABITAT, REGIONAL ABUNDANCE, AND CONSERVATION STATUS OF MARINE MAMMALS THAT MAY OCCUR IN OR NEAR THE SEISMIC SURVEY AREA IN THE WESTERN TROPICAL PACIFIC OCEAN—Continued

[See text and Tables 2 to 3 in SIO's application for further details]

Species	Habitat	Regional abundance [4]	ESA [1]	MMPA [2]	Density (#/1,000 km^2) CNMI, Hawaii, and mean [3]
Short-finned pilot whale (*Globicephala macrorhynchus*).	Pelagic, shelf coastal	500,000 [14]	NL	NC	1.59 2.54 2.11
Pinnipeds:					
Hawaiian monk seal (*Monachus schauinslandi*).	Coastal and pelagic ...	1,129 [15]	EN	D	NA

N.A. Not available or not assessed.
[1] U.S. Endangered Species Act: EN = Endangered, T = Threatened, NL = Not listed.
[2] U.S. Marine Mammal Protection Act: D = Depleted, NC = Not Classified.
[3] CNMI, Hawaii, and mean density estimates as listed in Table 3 of the application.
[4] Eastern Tropical Pacific in 1986 to 1990 (Wade and Gerrodette, 1993) unless otherwise indicated.
[5] North Pacific (Barlow *et al.,* 2009).
[6] Northwest Pacific and Okhotsk Sea (IWC, 2007a).
[7] North Pacific (Jefferson *et al.,* 2008).
[8] North Pacific (Tillman, 1977).
[9] North Pacific (Ohsumi and Wada, 1974).
[10] Western North Pacific (Whitehead, 2002a).
[11] Eastern Tropical Pacific (ETP); all *Mesoplodon* spp. (Wade and Gerrodette, 1993).
[12] Western/Southern Offshore Stock in ETP in 2000 (Jefferson *et al.,* 2008).
[13] ETP in 2000 (Jefferson *et al.,* 2008).
[14] ETP (Jefferson *et al.,* 2008).
[15] Entire species (Caretta *et al.,* 2010).

Refer to section III and IV of SIO's application for detailed information regarding the abundance and distribution, population status, and life history and behavior of these species and their occurrence in the project area. The application also presents how SIO calculated the estimated densities for the marine mammals in the survey area. NMFS has reviewed these data and determined them to be the best available scientific information for the purposes of the IHA.

Potential Effects on Marine Mammals

Acoustic stimuli generated by the operation of the airguns, which introduce sound into the marine environment, may have the potential to cause Level B harassment of marine mammals in the survey area. The effects of sounds from airgun operations might include one or more of the following: Tolerance, masking of natural sounds, behavioral disturbance, temporary or permanent hearing impairment, or non-auditory physical or physiological effects (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007).

Permanent hearing impairment, in the unlikely event that it occurred, would constitute injury, but temporary threshold shift (TTS) is not an injury (Southall *et al.,* 2007). Although the possibility cannot be entirely excluded, it is unlikely that the project would result in any cases of temporary or permanent hearing impairment, or any significant non-auditory physical or physiological effects. Based on the available data and studies, some behavioral disturbance is expected, but NMFS expects the disturbance to be localized and short-term.

The notice of the proposed IHA (76 FR 45518, July 29, 2011) included a discussion of the effects of sounds from airguns on mysticetes, odontocetes, and pinnipeds including tolerance, masking, behavioral disturbance, hearing impairment, and other non-auditory physical effects. NMFS refers the reader to SIO's application and EA for additional information on the behavioral reactions (or lack thereof) by all types of marine mammals to seismic vessels.

Anticipated Effects on Marine Mammal Habitat, Fish, Fisheries, and Invertebrates

NMFS included a detailed discussion of the potential effects of this action on marine mammal habitat, including physiological and behavioral effects on marine fish, fisheries, and invertebrates in the notice of the proposed IHA (76 FR 45518, July 29, 2011). While NMFS anticipates that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification, this impact to habitat is temporary and reversible which NMFS considered in further detail in the notice of the proposed IHA (76 FR 45518, July 29, 2011) as behavioral modification. The main impact associated with the activity would be temporarily elevated noise levels and the associated direct effects on marine mammals.

Recent work by Andre *et al.* (2011) purports to present the first morphological and ultrastructural evidence of massive acoustic trauma (i.e., permanent and substantial alterations of statocyst sensory hair cells) in four cephalopod species subjected to low-frequency sound. The cephalopods, primarily cuttlefish, were exposed to continuous 40 to 400 Hz sinusoidal wave sweeps (100% duty cycle and 1 s sweep period) for two hours while captive in relatively small tanks (one 2,000 liter [L, 2 m^3] and one 200 L [0.2 m^3] tank). The received SPL was reported as 157 ± 5 dB re 1 μPa, with peak levels at 175 dB re 1 μPa. As in the McCauley *et al.* (2003) paper on sensory hair cell damage in pink snapper as a result of exposure to seismic sound, the cephalopods were subjected to higher sound levels than they would be under natural conditions, and they were unable to swim away from the sound source.

Mitigation

In order to issue an ITA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such species or stock for taking for subsistence uses.

SIO has based the mitigation measures described herein, to be implemented for the seismic survey, on the following:

(1) Protocols used during previous SIO seismic research cruises as approved by NMFS;

(2) Previous IHA applications and IHAs approved and authorized by NMFS; and

(3) Recommended best practices in Richardson *et al.* (1995), Pierson *et al.* (1998), and Weir and Dolman, (2007).

To reduce the potential for disturbance from acoustic stimuli associated with the activities, SIO and/or its designees shall implement the following mitigation measures for marine mammals:

(1) Exclusion zones;

(2) Speed or course alteration;

(3) Shut-down procedures; and

(4) Ramp-up procedures.

Exclusion Zones—Received sound levels have been modeled by L–DEO for a number of airgun configurations, including two 105 in^3 GI airguns, in relation to distance and direction from the airguns (see Figure 2 of the IHA application). The model does not allow for bottom interactions, and is most directly applicable to deep water. Based on the modeling, estimates of the maximum distances from the source where sound levels are predicted to be 190, 180, and 160 dB re 1 μPa (rms) in deep water were determined (see Table 2 below).

Empirical data concerning the 190, 180, and 160 dB (rms) distances were acquired for various airgun arrays based on measurements during the acoustic verification studies conducted by L–DEO in the northern GOM in 2003 (Tolstoy *et al.,* 2004) and 2007 to 2008 (Tolstoy *et al.,* 2009). Results of the 36 airgun array are not relevant for the two GI airguns to be used in the survey. The empirical data for the 6, 10, 12, and 20 airgun arrays indicate that, for deep water, the L–DEO model tends to overestimate the received sound levels at a given distance (Tolstoy *et al.,* 2004). Measurements were not made for the two GI airgun array in deep water, however, SIO proposes to use the EZ predicted by L–DEO's model for the GI airgun operations in deep water, although they are likely conservative give the empirical results for the other arrays.

The 180 and 190 dB radii are shut-down criteria applicable to cetaceans and pinnipeds, respectively, as specified by NMFS (2000); these levels were used to establish the EZs. If the PSO detects marine mammal(s) within or about to enter the appropriate EZ, the airguns will be shut-down, immediately.

Table 2 summarizes the predicted distances at which sound levels (160, 180, and 190 dB [rms]) are expected to be received from the two GI airgun array operating in deep water depths. Table 2. Distances to which sound levels ≥ 190, 180, and 160 dB re 1 μPa (rms) could be received in deep water during the seismic survey in the western tropical Pacific Ocean, November to December, 2011. Distances are based on model results provided by L–DEO.

Source and volume	Tow depth (m)	Water depth (m)	Predicted RMS radii distances (m)		
			190 dB	180 dB	160 dB
Two GI airguns (105 in^3)	3	Deep (≥ 1,000)	20	70	670

Speed or Course Alteration—If a marine mammal is detected outside the EZ and, based on its position and the relative motion, is likely to enter the EZ, the vessel's speed and/or direct course could be changed. This would be done if operationally practicable while minimizing the effect on the planned science objectives. The activities and movements of the marine mammal (relative to the seismic vessel) will then be closely monitored to determine whether the animal is approaching the applicable EZ. If the animal appears likely to enter the EZ, further mitigative actions will be taken, i.e., either further course alterations or a shut-down of the seismic source. Typically, during seismic operations, the source vessel is unable to change speed or course and one or more alternative mitigation measures will need to be implemented.

Shut-down Procedures—If a marine mammal is seen outside the EZ for the airgun(s), and if the vessel's speed and/or course cannot be changed to avoid having the animal enter the EZ, the seismic source will be shut-down before the animal is within the EZ. If a marine mammal is already within the EZ when first detected, the seismic source will be shut-down immediately.

Following a shut-down, SIO will not resume airgun activity until the marine mammal has cleared the EZ. SIO will consider the animal to have cleared the EZ if:

- A PSO has visually observed the animal leave the EZ, or
- A PSO has not sighted the animal within the EZ for 15 min for species with shorter dive durations (i.e., small odontocetes or pinnipeds), or 30 min for species with longer dive durations (i.e., mysticetes and large odontocetes, including sperm, killer, and beaked whales).

Ramp-up Procedures—SIO will follow a ramp-up procedure when the airgun array begins operating after a specified period without airgun operations or when a shut-down has exceeded that period. SIO proposes that, for the present cruise, this period would be approximately 15 min. SIO has used similar periods (approximately 15 min) during previous SIO surveys.

Ramp-up will begin with a single GI airgun (105 in^3). The second GI airgun (105 in^3) will be added after five min. During ramp-up, the Protected Species Observers (PSOs) will monitor the EZ, and if marine mammals are sighted, SIO will implement a shut-down as though both GI airguns were operational.

If the complete EZ has not been visible for at least 30 min prior to the start of operations in either daylight or nighttime, SIO will not commence the ramp-up. If one airgun has operated, ramp-up to full power will be permissible at night or in poor visibility, on the assumption that marine mammals will be alerted to the approaching seismic vessel by the sounds from the single airgun and could move away if they choose. A ramp-up from a shut-down may occur at night, but only where the EZ is small enough to be visible. SIO will not initiate a ramp-up of the airguns if a marine mammal is sighted within or near the applicable EZs during the day or close to the vessel at night.

NMFS has carefully evaluated the applicant's mitigation measures and has considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. NMFS's evaluation of potential measures included consideration of the following factors in relation to one another:

(1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;

(2) The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and

(3) The practicability of the measure for applicant implementation.

Based on NMFS's evaluation of the applicant's measures, as well as other

measures considered by NMFS or recommended by the public, NMFS has determined that the mitigation measures provide the means of effecting the least practicable impacts on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for IHAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

Monitoring

SIO will sponsor marine mammal monitoring during the present project, in order to implement the mitigation measures that require real-time monitoring, and to satisfy the monitoring requirements of the IHA. SIO's ''Monitoring Plan'' is described below this section. The monitoring work described here has been planned as a self-contained project independent of any other related monitoring projects that may be occurring simultaneously in the same regions. SIO is prepared to discuss coordination of its monitoring program with any related work that might be done by other groups insofar as this is practical and desirable.

Vessel-Based Visual Monitoring

SIO's PSOs will be based aboard the seismic source vessel and will watch for marine mammals near the vessel during daytime airgun operations and during any ramp-ups at night. PSOs will also watch for marine mammals near the seismic vessel for at least 30 min prior to the ramp-up of airgun operations after an extended shut-down (i.e., greater than approximately 15 min for this cruise). When feasible, PSOs will conduct observations during daytime periods when the seismic system is not operating for comparison of sighting rates and behavior with and without airgun operations and between acquisition periods. Based on PSO observations, the airguns will be shut-down when marine mammals are observed within or about to enter a designated EZ. The EZ is a region in which a possibility exists of adverse effects on animal hearing or other physical effects.

During seismic operations in the western tropical Pacific Ocean, at least three PSOs will be based aboard the *Thompson*. SIO will appoint the PSOs with NMFS's concurrence. At least one PSO will monitor the EZs during seismic operations. Observations will take place during ongoing daytime operations and nighttime ramp-ups of the airguns. PSO(s) will be on duty in shifts of duration no longer than 4 hr. The vessel crew will also be instructed to assist in detecting marine mammals.

The *Thompson* is a suitable platform for marine mammal observations. Two locations are likely as observation stations onboard the *Thompson.* At one station on the bridge, the eye level will be approximately 13.8 m (45.3 ft) above sea level and the location will give the PSO a good view around the entire vessel (i.e., 310° for one PSO and a full 360° when two PSOs are stationed at different vantage points). A second observation site is the 03 deck where the PSOs eye level will be 10.8 m (35.4 ft) above sea level. The 03 deck offers a view of 330° for the two PSOs.

During daytime, the PSOs will scan the area around the vessel systematically with reticle binoculars (e.g., 7 x 50 Fujinon), Big-eye binoculars (25 x 150), optical range finders and with the naked eye. During darkness, night vision devices (NVDs) will be available, when required. The PSOs will be in wireless communication with the vessel's officers on the bridge and scientists in the vessel's operations laboratory, so they can advise promptly of the need for avoidance maneuvers or seismic source shut-down. When marine mammals are detected within or about to enter the designated EZ, the airguns will immediately be shut-down if necessary. The PSO(s) will continue to maintain watch to determine when the animal(s) are outside the EZ by visual confirmation. Airgun operations will not resume until the animal is confirmed to have left the EZ, or if not observed after 15 min for species with shorter dive durations (small odontocetes and pinnipeds) or 30 min for species with longer dive durations (mysticetes and large odontocetes, including sperm, killer, and beaked whales).

PSO Data and Documentation

PSOs will record data to estimate the numbers of marine mammals exposed to various received sound levels and to document apparent disturbance reactions or lack thereof. Data will be used to estimate numbers of animals potentially ''taken'' by harassment (as defined in the MMPA). They will also provide information needed to order a shut-down of the airguns when a marine mammal is within or near the EZ. Observations will also be made during daytime periods when the *Thompson* is underway without seismic operations (i.e., transits to, from, and through the study area) to collect baseline biological data.

When a sighting is made, the following information about the sighting will be recorded:

1. Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the airguns or vessel (e.g., none, avoidance, approach, paralleling, etc.), and behavioral pace.

2. Time, location, heading, speed, activity of the vessel, Beaufort sea state, visibility, and sun glare.

The data listed under (2) will also be recorded at the start and end of each observation watch, and during a watch whenever there is a change in one or more of the variables.

All observations as well as information regarding shut-downs of the seismic source, will be recorded in a standardized format. The data accuracy will be verified by the PSOs at sea, and preliminary reports will be prepared during the field program and summaries forwarded to the operating institution's shore facility and to NSF weekly or more frequently.

Vessel-based observations by the PSO will provide:

1. The basis for real-time mitigation (airgun shut-down).

2. Information needed to estimate the number of marine mammals potentially taken by harassment, which must be reported to NMFS.

3. Data on the occurrence, distribution, and activities of marine mammals in the area where the seismic study is conducted.

4. Information to compare the distance and distribution of marine mammals relative to the source vessel at times with and without seismic activity.

5. Data on the behavior and movement patterns of marine mammals seen at times with and without seismic activity.

SIO will submit a report to NMFS and NSF within 90 days after the end of the cruise. The report will describe the operations that were conducted and sightings of marine mammals near the operations. The report will provide full documentation of methods, results, and interpretation pertaining to all

monitoring. The 90-day report will summarize the dates and locations of seismic operations, and all marine mammal sightings (dates, times, locations, activities, associated seismic survey activities). The report will also include estimates of the number and nature of exposures that could result in potential ''takes'' of marine mammals by harassment or in other ways.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA, such as an injury (Level A harassment), serious injury or mortality (e.g., ship-strike, gear interaction, and/or entanglement), SIO will immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS at (301) 427–8401 and/or by email to *Michael.Payne@noaa.gov* and *Howard.Goldstein@noaa.gov,* and the NMFS Pacific Islands Regional Office Stranding Coordinator at (808) 944–2269 (*David.Schofield@noaa.gov*). The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source use in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with SIO to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. SIO may not resume their activities until notified by NMFS via letter or email, or telephone.

In the event that SIO discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), SIO will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at (301) 427–8401, and/or by email to *Michael.Payne@noaa.gov* and *Howard.Goldstein@noaa.gov,* and the NMFS Pacific Islands Regional Office (808) 944–2269) and/or by email to the Pacific Islands Regional Stranding Coordinator (*David.Schofield@noaa.gov*). The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with SIO to determine whether modifications in the activities are appropriate.

In the event that SIO discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), SIO will report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at (301) 427–8401, and/or by email to *Michael.Payne@noaa.gov* and *Howard.Goldstein@noaa.gov,* and the NMFS Pacific Islands Regional Office (808) 944–2269), and/or by email to the Pacific Islands Regional Stranding Coordinator (*David.Schofield@noaa.gov*), within 24 hours of discovery. SIO will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Only take by Level B harassment is anticipated and authorized as a result of the marine geophysical survey in the western tropical Pacific Ocean. Acoustic stimuli (i.e., increased underwater sound) generated during the operation of the seismic airgun array may have the potential to cause marine mammals in the survey area to be exposed to sounds at or greater than 160 dB or cause temporary, short-term changes in behavior. There is no evidence that the planned activities could result in injury, serious injury, or mortality within the specified geographic area for which NMFS has issued the IHA. Take by injury, serious injury, or mortality is thus neither anticipated nor authorized. NMFS has determined that the required mitigation and monitoring measures will minimize any potential risk for injury, serious injury, or mortality.

The following sections describe SIO's methods to estimate take by incidental harassment and present the applicant's estimates of the numbers of marine mammals that could be affected during the seismic program. The estimates are based on a consideration of the number of marine mammals that could be disturbed appreciably by operations with the two GI airgun array to be used during approximately 1,600 km of survey lines in the western tropical Pacific Ocean.

SIO assumes that, during simultaneous operations of the airgun array and the other sources, any marine mammals close enough to be affected by the MBES and SBP would already be affected by the airguns. However, whether or not the airguns are operating simultaneously with the other sources, marine mammals are expected to exhibit no more than short-term and inconsequential responses to the MBES and SBP given their characteristics (e.g., narrow, downward-directed beam) and other considerations described previously. Such reactions are not considered to constitute ''taking'' (NMFS, 2001). Therefore, SIO provides no additional allowance for animals that could be affected by sound sources other than airguns.

Extensive systematic ship-based surveys have been conducted by NMFS Southwest Fisheries Science Center (SWFSC) for marine mammals in the eastern, but not the western tropical Pacific Ocean. A systematic vessel-based marine mammal survey was conducted approximately 2,500 km (1,349.9 nmi) west of the planned survey area in the Commonwealth of the Northern Mariana Islands (CNMI) for the U.S. Navy during January to April, 2007 (SRS-Parsons *et al.,* 2007; Fulling *et al.,* in press). The cruise area was defined by the boundaries 10° to 18° North, 142° to 148° East, encompassing an area approximately 585,000 km^2 (170,558.7 nmi^2) including the islands of Guam and the southern CNMI. The survey was conducted using standard line-transect protocols developed by NMFS SWFSC. Observers visually surveyed 11,033 km (5,957.3 nmi) of trackline, mostly in high sea states (88% of the time in Beaufort Sea states four to six). Another survey was conducted by SWFSC approximately 3,500 km

(1,889.8 nmi) east of the survey area in the EEZ around Hawaii during August to November, 2002; survey effort was 3,550 km (1,916.8 nmi) in the ''Main Island stratum,'' which had a surface area of 2,240,024 km² (653,086.5 nmi²) (Barlow, 2006).

SIO used densities that were the effort-weighted means for the CNMI (Fulling *et al.,* in press) and the outer EEZ stratum of Hawaii (Barlow, 2006). The densities had been corrected, by the original authors, for trackline detection probability bias, and for data from Hawaii, for availability bias. Trackline detection probability bias is associated with diminishing sightability with increasing lateral distance from the trackline, and is measured by $f(0)$. Availability bias refers to the fact that there is less-than-100% probability of sighting an animal that is present along the survey trackline $f(0)$, and it is measured by g(0). Fulling *et al.* (in press) did not correct the CNMI densities for availability bias (i.e., it was assumed that g(0) = 1), which resulted in underestimates of density. The densities are given in Table 3 of SIO's IHA application.

There is some uncertainty about the representativeness of the data and the assumptions used in the calculations, for example:

(1) The timing of most of the surveys was different, the CNMI survey was from January to April, the Hawaii survey was from August to November, and the SIO survey is from November to December;

(2) Locations were also different, with the survey area approximately 2,500 km east of the CNMI and approximately 3,500 km west of Hawaii; and

(3) Most of the Marianas survey was in high sea states that would have prevented detection of many marine mammals, especially cryptic species such as beaked whales and *Kogia* spp. However, the approach used here is believed to be the best available approach.

SIO's estimates of exposures to various sound levels assume that the surveys will be fully completed; in fact, the ensonified areas calculated using the planned number of line-km have been increased by 25% to accommodate turns, lines that may need to be repeated, equipment testing, etc. As is typical during offshore ship surveys, inclement weather and equipment malfunctions are likely to cause delays and may limit the number of useful line-kilometers of seismic operations that can be undertaken. Furthermore, any marine mammal sightings within or near the designated EZs will result in the shut-down of seismic operations as a mitigation measure. Thus, the following estimates of the numbers of marine mammals potentially exposed to sound levels of 160 dB re 1 μPa (rms) are precautionary and probably overestimate the actual numbers of marine mammals that might be involved. These estimates also assume that there will be no weather, equipment, or mitigation delays, which is highly unlikely.

SIO estimated the number of different individuals that may be exposed to airgun sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) on one or more occasions by considering the total marine area that would be within the 160 dB radius around the operating airgun array on at least one occasion, along with the expected density of marine mammals in the area. The seismic lines do not run parallel to each other in close proximity and the ensonified areas do not overlap, thus an individual mammal that was stationary would be exposed once during the survey.

The numbers of different individuals potentially exposed to greater than or equal to 160 dB (rms) were calculated by multiplying the expected species density times the anticipated area to be ensonified. The area was determined by entering the planned survey lines into a MapInfo GIS, using the GIS to identify the relevant areas by ''drawing'' the applicable 160 dB buffer (see Table 1 of the IHA application) around each seismic line, and then calculating the total area within the buffers. For this survey, there were no areas of overlap because of crossing lines.

Applying the approach described above, approximately 2,144 km² (625.1 nmi²) (approximately 2,680 km² [781.4 nmi²] including the 25% contingency) would be within the 160 dB isopleth on one or more occasions during the survey. Because this approach does not allow for turnover in the marine mammal populations in the study area during the course of the survey, the actual number of individuals exposed could be underestimated, although the conservative (i.e., probably overestimated) line-kilometer distances used to calculate the area may offset this. Also, the approach assumes that no cetaceans will move away from or toward the trackline as the *Thompson* approaches in response to increasing sound levels prior to the time the levels reach 160 dB. Another way of interpreting the estimates that follow is that they represent the number of individuals that are expected (in the absence of a seismic program) to occur in the waters that will be exposed to greater than or equal to 160 dB re 1 μPa (rms).

Table 3 (Table 4 of the IHA application) shows the estimates of the number of different individual marine mammals that potentially could be exposed to greater than or equal to 160 dB re 1 μPa (rms) during the seismic survey if no animals moved away from the survey vessel. The requested take authorization is given in Table 3 (below; the far right column of Table 4 of the IHA application). For ESA listed species, the requested take authorization has been increased to the mean group size in the CNMI (Fulling *et al.,* in press) for the particular species in cases where the calculated number of individuals exposed was between 0.05 and the mean group size (i.e., for the sei whale). For species not listed under the ESA that could occur in the study area, the requested take authorization has been increased to the mean group size in the CNMI (Fulling *et al.,* in press) or, for species not sighted in the CNMI survey, Hawaii (Barlow, 2006) for the particular species in cases where the calculated number of individuals exposed was between 1 and the mean group size.

The estimate of the number of individual cetaceans that could be exposed to seismic sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) during the survey is 632 animals (118 individual cetaceans were estimated Table 4 of the IHA application). That total includes 2 Bryde's whale, 2 sei whales, 25 sperm whales, 5 pygmy sperm whales, 12 dwarf sperm whales, 10 Cuvier's beaked whales, 18 Longman's beaked whale, 2 Blainville's beaked whales, 20 rough-toothed dolphins, 20 bottlenose dolphins, 64 pantropical spotted dolphins, 98 spinner dolphins, 27 striped dolphins, 182 Fraser's dolphins, 15 Risso's dolphin, 95 melon-headed whales, 10 false killer whales, 7 killer whales, and 18 short-finned pilot whales which would represent less than 0.01%, 0.03%, 0.08%, NA, 0.11%, 0.05%, NA, less than 0.01%, 0.01%, less than 0.01%, less than 0.01%, 0.01%, less than 0.01%, 0.06%, less than 0.01%, 0.21%, 0.03%, 0.08%, and less than 0.01% of the regional populations, respectively. Most (58.2%) of the cetaceans potentially exposed are delphinids; pantropical spotted, striped, and Fraser's dolphins, as well as melon-headed whales, are estimated to be the most common species in the study area. The authorized incidental take numbers of Bryde's (2), sei (2), sperm (25), Longman's beaked (18), melon-headed (95), false killer (10), killer (7), and short-finned pilot whales (18) as well as rough-toothed (20), bottlenose (20),

pantropical spotted (64), spinner (98), striped (27), Fraser's (182), and Risso's (15) dolphins has been increased from the original IHA application to account for possible exposure of mother-calf pairs, mean group size in the Commonwealth of the Northern Mariana Islands (CNMI) (Fulling *et al.,* in press) or Hawaii (Barlow, 2006), or for best available estimate of group size (Jaquet and Gendron, 2009).

TABLE 3—ESTIMATES OF THE POSSIBLE NUMBERS OF MARINE MAMMALS EXPOSED TO DIFFERENT SOUND LEVELS ≥ 160 dB DURING SIO'S SEISMIC SURVEY IN THE WESTERN TROPICAL PACIFIC OCEAN DURING NOVEMBER TO DECEMBER 2011

Species	Estimated number of individuals exposed to sound levels ≥160 dB re 1 μPa [1]	Authorized take requested	Incidental take authorized	Approximate percent of regional population [2]
Mysticetes:				
Humpback whale	0	0	0	0
Minke whale	0	0	0	0
Bryde's whale	1	[3] 1	2	0.01
Sei whale	0	[3] 1	2	0.03
Fin whale	0	0	0	0
Blue whale	0	0	0	0
Odontocetes:				
Sperm whale	6	6	25	0.08
Pygmy sperm whale	5	5	5	NA
Dwarf sperm whale	12	12	12	0.11
Cuvier's beaked whale	10	10	10	0.05
Longman's beaked whale	1	18	18	NA
Blainville's beaked whale	2	2	2	< 0.01
Ginkgo-toothed beaked whale	0	0	0	0
Rough-toothed dolphin	5	[3] 9	20	0.01
Bottlenose dolphin	2	[3] 2	20	< 0.01
Pantropical spotted dolphin	30	[3] 64	64	< 0.01
Spinner dolphin	5	[3] 98	98	0.01
Striped dolphin	16	[3] 27	27	< 0.01
Fraser's dolphin	7	[4] 182	182	0.06
Risso's dolphin	1	[4] 15	15	< 0.01
Melon-headed whale	7	[3] 95	95	0.21
Pygmy killer whale	0	0	0	0
False killer whale	2	[3] 10	10	0.03
Killer whale	0	[4] 7	7	0.08
Short-finned pilot whale	6	[3] 18	18	< 0.01
Pinnipeds:				
Hawaiian monk seal	0	0	0	0

[1] Estimates are based on densities from Table 1 (Table 3 of the IHA application) and ensonified areas (including 25% contingency) for 160 dB of 2,680 km^2.
[2] Regional population size estimates are from Table 1 (see Table 2 of the IHA application); NA means not available.
[3] Increased to mean group size in the CNMI (Fulling *et al.* in press).
[4] Increased to mean group size in Hawaii (Barlow, 2006).

Encouraging and Coordinating Research

SIO and NSF will coordinate the planned marine mammal monitoring program associated with the seismic survey in the western tropical Pacific Ocean with any parties that may have or express an interest in the seismic survey. UW will work with the U.S. Department of State to obtain the necessary approvals for operating in the foreign EEZ of the Republic of the Marshall Islands.

Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS evaluated factors such as:

(1) The number of anticipated injuries, serious injuries, or mortalities;

(2) The number, nature, and intensity, and duration of Level B harassment (all relatively limited);

(3) The context in which the takes occur (i.e., impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to baseline data);

(4) The status of stock or species of marine mammals (i.e., depleted, not depleted, decreasing, increasing, stable, and impact relative to the size of the population);

(5) Impacts on habitat affecting rates of recruitment/survival; and

(6) The effectiveness of monitoring and mitigation measures (i.e., the manner and degree in which the measure is likely to reduce adverse impacts to marine mammals, the likely effectiveness of the measures, and the practicability of implementation).

For reasons stated previously in this document, and in the notice of the proposed IHA (76 FR 45518, July 29, 2011), the specified activities associated with the marine seismic survey are not likely to cause PTS, or other non-auditory injury, serious injury, or death because:

(1) The likelihood that, given sufficient notice through relatively slow ship speed, marine mammals are expected to move away from a noise source that is annoying prior to its becoming potentially injurious;

(2) The potential for temporary or permanent hearing impairment is

relatively low and would likely be avoided through the incorporation of the required monitoring and mitigation measures (described above);

(3) The fact that pinnipeds would have to be closer than 20 m (65.6 ft) in deep water when the two GI airgun array is in use at 3 m (9.8 ft) tow depth from the vessel to be exposed to levels of sound believed to have even a minimal chance of causing PTS;

(4) The fact that cetaceans would have to be closer than 70 m (229.7 ft) in deep water when the two GI airgun array is in 3 m tow depth from the vessel to be exposed to levels of sound believed to have even a minimal chance of causing PTS; and

(5) The likelihood that marine mammal detection ability by trained PSOs is high at close proximity to the vessel.

No injuries, serious injuries, or mortalities are anticipated to occur as a result of SIO's planned marine seismic survey, and none are authorized by NMFS. Only short-term, behavioral disturbance is anticipated to occur due to the brief and sporadic duration of the survey activities. Table 3 in this document outlines the number of Level B harassment takes that are anticipated as a result of the activities. Due to the nature, degree, and context of Level B (behavioral) harassment anticipated and described (see ''Potential Effects on Marine Mammals'' section above) in this notice, the activity is not expected to impact rates of recruitment or survival for any affected species or stock. Additionally, the seismic survey will not adversely impact marine mammal habitat.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (i.e., 24 hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). While seismic operations are anticipated to occur on consecutive days, the entire duration of the survey is not expected to last more than 32 days and the *Thompson* will be continuously moving along planned tracklines that are geographically spread-out (i.e., two parallel lines, 5.4 nmi [10 km] apart and 432 nmi [800 km] long). Therefore, the seismic survey will be increasing sound levels in the marine environment in a small area surrounding the vessel, which is constantly traveling over far distances, for a relatively short time period (i.e., several weeks) in the study area.

Of the 26 marine mammal species under NMFS jurisdiction that are known to or likely to occur in the study area, six are listed as threatened or endangered under the ESA: Humpback, sei, fin, blue, and sperm whales, and Hawaiian monk seals. These species are also considered depleted under the MMPA. Of these ESA-listed species, incidental take has been authorized for sei and sperm whales. The Hawaiian monk seal population has generally been decreasing (the main Hawaiian islands population appears to be increasing). There is generally insufficient data to determine population trends for the other depleted species in the study area. To protect these animals (and other marine mammals in the study area), SIO must cease or reduce airgun operations if animals enter designated zones. No injury, serious injury, or mortality is expected to occur and due to the nature, degree, and context of the Level B harassment anticipated, the activity is not expected to impact rates of recruitment or survival.

As mentioned previously, NMFS estimates that 19 species of marine mammals under its jurisdiction could be potentially affected by Level B harassment over the course of the IHA. For each species, these numbers are small (each less than one percent) relative to the regional population size. The population estimates for the marine mammal species that may be taken by Level B harassment were provided in Table 1 of this document.

NMFS's practice has been to apply the 160 dB re 1 μPa (rms) received level threshold for underwater impulse sound levels to determine whether take by Level B harassment occurs. Southall *et al.* (2007) provide a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of anthropogenic sound (see Table 4 in Southall *et al.* [2007]).

NMFS has determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of conducting a marine geophysical survey in the western tropical Pacific Ocean, November to December, 2011, may result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of small numbers of certain species of marine mammals. See Table 3 (above) for the requested authorized take numbers of cetaceans.

While behavioral modifications, including temporarily vacating the area during the operation of the airgun(s), may be made by these species to avoid the resultant acoustic disturbance, the availability of alternate areas within these areas and the short and sporadic duration of the research activities, have led NMFS to determine that this action will have a negligible impact on the species in the specified geographic region.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that SIO's planned research activities, will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the marine seismic survey will have a negligible impact on the affected species or stocks of marine mammals; and that impacts to affected species or stocks of marine mammals have been mitigated to the lowest level practicable.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

Section 101(a)(5)(D) also requires NMFS to determine that the authorization will not have an unmitigable adverse effect on the availability of marine mammal species or stocks for subsistence use. There are no relevant subsistence uses of marine mammals in the study area (offshore waters of the western tropical Pacific Ocean) that implicate MMPA section 101(a)(5)(D).

Endangered Species Act

Of the species of marine mammals that may occur in the survey area, several are listed as endangered under the ESA, including the humpback, sei, fin, blue, and sperm whales, as well as the Hawaiian monk seal. Under section 7 of the ESA, NSF initiated formal consultation with the NMFS, Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, on this seismic survey. NMFS's Office of Protected Resources, Permits and Conservation Division, initiated formal consultation under section 7 of the ESA with NMFS's Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, to obtain a Biological Opinion (BiOp) evaluating the effects of issuing the IHA on threatened and endangered marine mammals and, if appropriate, authorizing incidental take. In November, 2011, NMFS issued a BiOp and concluded that the action and issuance of the IHA are not likely to jeopardize the continued existence of humpback, sei, fin, blue, and sperm whales, or the Hawaiian monk seal. NSF

and SIO must comply with the Relevant Terms and Conditions of the Incidental Take Statement (ITS) corresponding to NMFS's BiOp issued to NSF, SIO, and NMFS's Office of Protected Resources. SIO must comply with the mitigation and monitoring requirements included in the IHA in order to be exempted under the ITS in the BiOp from the prohibition on take of listed endangered marine mammal species otherwise prohibited by section 9 of the ESA.

National Environmental Policy Act

NSF prepared an ''Environmental Assessment Pursuant to the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.* and Executive Order 12114, Marine Geophysical Survey by the R/V *Thompson* in the western tropical Pacific Ocean, November–December 2011,'' which incorporated an ''Environmental Assessment of a Low-Energy marine Geophysical Survey by the R/V *Thompson* in the Western Tropical Pacific Ocean, November–December 2011,'' prepared by LGL. NMFS conducted an independent review and evaluation of the document for sufficiency and compliance with the Council on Environmental Quality regulations and NOAA Administrative Order (NAO) 216–6 § 5.09(d) and determined that issuance of the IHA is not likely to result in significant impacts on the human environment. Consequently, NMFS has adopted NSF's EA and prepared a Finding of No Significant Impact (FONSI) for the issuance of the IHA. An Environmental Impact Statement is not required and will not be prepared for the action.

Authorization

NMFS has issued an IHA to SIO for the take, by Level B harassment, of small numbers of marine mammals incidental to conducting a marine seismic survey in the western tropical Pacific Ocean, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: October 31, 2011.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–28782 Filed 11–4–11; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA627

Taking and Importing Marine Mammals: Taking Marine Mammals Incidental to Navy Training Exercises in Three East Coast Range Complexes

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed modification to letters of authorization; request for comments.

SUMMARY: NMFS has received an application from the U.S. Navy (Navy) for modification of three Letters of Authorizations (LOAs) NMFS issued to take marine mammals, by harassment, incidental to conducting training exercises within the Navy's Virginia Capes (VACAPES), Jacksonville (JAX), and Cherry Point (CHPT) Range Complexes off the East Coast of the U.S. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue three modified LOAs to the Navy to incidentally take marine mammals by harassment during the specified activity. These three LOAs, if issued, would supersede those issued on June 1, 2011, but would maintain the same expiration date (May 31, 2012).

DATES: Comments and information must be received no later than December 7, 2011.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.Guan@noaa.gov.* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

A copy of the application used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 427–8418.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a military readiness activity if certain findings are made and regulations are issued.

Authorization may be granted for periods of 5 years or less if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses. In addition, NMFS must prescribe regulations that include permissible methods of taking and other means effecting the least practicable adverse impact on the species and its habitat, and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance. The regulations also must include requirements pertaining to the monitoring and reporting of such taking.

Regulations governing the taking of marine mammals incidental to the U.S. Navy's training activities at the Navy's VACAPES, JAX, and Cherry Point range complexes were published on June 15, 2009 (VACAPES: 74 FR 28328; JAX: 74 FR 28349; CHPT: 74 FR 28370) and remain in effect through June 4, 2014. They are codified at 50 CFR part 218 subpart A (for VACAPES Range Complex), subpart B (for JAX Range Complex), and subpart C (for Cherry Point Range Complex). These regulations include mitigation, monitoring, and reporting requirements for the incidental taking of marine mammals by the Navy's range complex training exercises. For detailed information on these actions, please refer to the June 15, 2009 **Federal Register** Notices and 50 CFR part 218 subparts A, B, and C.

An interim final rule was issued on May 26, 2011 (76 FR 30552) to allow

certain flexibilities concerning Navy's training activities at VACAPES and JAX, and LOAs were issued to the Navy on June 1st, 2011 (76 FR 33266; June 8, 2011).

Summary of LOA Request

On July 6, 2011, NMFS received a request from the U.S. Navy for modifications to three LOAs issued by NMFS on June 1, 2011, to take marine mammals incidental to training activities at VACAPES, JAX, and CHPT Range Complexes (76 FR 33266; June 8, 2011). Specifically, the Navy requests that NMFS modify these LOAs to include taking of marine mammals incidental to mine neutralization training using time-delay firing devices (TDFD) within the above Range Complexes, along with revised mitigation measures, to ensure that effects to marine mammals resulting from these activities will not exceed what was originally analyzed in the Final Rules for these Range Complexes (VACAPES: 74 FR 28328; JAX: 74 FR 28349; CHPT: 74 FR 28370). The potential effects of mine neutralization training on marine mammals were comprehensively analyzed in the Navy's 2009 final regulations for these three Range Complexes and mine neutralization training has been included in the specified activity in the associated 2009, 2010, and 2011 LOAs. However, the use of TDFD and the associated mitigation measures have not been previously contemplated, which is why NMFS believes it is appropriate to provide these proposed modified LOAs to the public for review.

On March 4, 2011, a mine neutralization training event using TDFDs is believed to have likely resulted in the death of 5 dolphins in Navy's Silver Strand Training Complex. In short, a TDFD device begins a countdown to a detonation event that cannot be stopped, for example, with a 10-min TDFD, once the detonation has been initiated, 10 minutes pass before the detonation occurs and the event cannot be cancelled during that 10 minutes. Following the March 4th event, the Navy initiated an evaluation of mine neutralization events occurring within the VACAPES, JAX, and CHPT Range Complexes and realized that TDFDs were being used at those Range Complexes. According to the Navy, less than 3% of all MINEX events would not use TDFD. As a result, the Navy subsequently suspended all underwater explosive detonations using TDFDs during training, and the three LOAs issued on June 1, 2011, by NMFS specifically do not cover marine mammals taken incidentally as a result of such training activities. While this suspension is in place, the Navy has been working with NMFS to develop a more robust monitoring and mitigation plan to ensure that marine mammal mortality and injury would not occur during mine neutralization training activities using TDFDs. The following sections provide detailed descriptions regarding the mine neutralization training activities, the current mitigation measures, and the Navy's proposed revisions to mitigation measures that are intended to prevent mortality and injury to marine mammals.

The Navy's requests the revised LOAs remain valid until June 2012. A detailed description of the Navy's LOA modification request can be found on NMFS Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*.

Description of the Need for Time-Delay Firing Devices in MINEX Training

Overall Operational Mission

Explosive Ordnance Disposal (EOD) personnel require realistic training before conducting high risk, real-world operations. Such real-world operations include those similar to recent world events requiring movement of assets from sea to land and back to sea. These real-world operations involve non-permissive environments (*i.e.,* mine fields, enemy ships, aircraft, etc.) that require Sailors to carry out their mission undetected and with reduced risk. Proficiency in EOD training generally, and use of TDFDs as described above, specifically, is critical for ensuring the mission of a real-world operation is accomplished safely and Sailors return unharmed. Substitutes to using TDFDs are contradictory to realistic training and are inadequate at satisfying military readiness requirements.

EOD personnel detect, identify, evaluate, neutralize, raise, tow, beach, and exploit mines. Neutralizing an influence mine (*e.g.,* a mine that could be triggered by a magnetic, pressure, or acoustic signature) is an essential part of the EOD Mine Countermeasures (MCM) mission. Neutralization ensures the safety of the men and women of EOD in the recovery and exploitation phase of an influence mine. The EOD mission is typically to locate, neutralize, recover, and exploit mines after they are initially located by another source, such as a MCM or Mine Hunting Class (MHC) ship or an MH–53 or MH–60 helicopter. Once the mine shapes are located, EOD divers are deployed to further evaluate and ''neutralize'' the mine.

During a mine neutralization exercise, if the mine is located on the water's surface, then EOD divers are deployed via helicopter. If the mine is located at depth, then EOD divers are deployed via small boat. The neutralization of mines in the water is normally executed with an explosive device and may involve detonation of up to 20 pounds net explosive weight of explosives. The charge is set with a TDFD since this is the method of detonating the charge in a real-world event.

TDFDs are the safest and most operationally sound method of initiating a demolition charge on a floating mine or mine at depth. TDFDs are used because of their ease of employment, light weight, low magnetic signature, and because they completely eliminate the need to re-deploy swimmers from a helicopter to recover equipment used with positive control firing devices, *i.e.,* detonating the charge without any time-delay. Most importantly, the TDFD also allows EOD personnel to make their way outside of the detonation plume radius/human safety buffer zone.

By using electronic devices as an alternative to a TDFD, such as positive control devices that do not include a delay, additional metal is unnecessarily introduced into an influence ordnance operating environment, which means an environment that includes mines equipped with firing circuits (an ''influence firing circuit'') that may be actuated by magnetic, pressure, or acoustic influences. While positive control devices do allow for instantaneous detonation of the charge, they introduce operationally unsound tactics, thereby increasing risks to the dive team. It is essential that the platoons train like they operate by using TDFDs. In a live mine field, MCM platoons expect there to be additional risks, such as unknown mines with different types of influence firing circuits that can be in close proximity to the mine they are prosecuting. The use of a TDFD reduces these risks by limiting the possibility of unintentionally triggering the influence firing circuits.

A Radio Firing Device (RFD), a type of positive control device, can be used to initiate the charge on a bottom mine, but it is not normally used as a primary firing device due to hazards of electromagnetic radiation to ordnance concerns of the electric detonator, Operational Risk Management (ORM) (*i.e.,* safety) considerations, and established tactical procedures; therefore, they are not considered a practicable alternative.

Adding a positive control firing device to a TDFD as a primary means of detonation is not practicable due to ORM considerations. It is not sound

ORM or good demolition practice to combine different firing circuits to a demolition charge. In an open ocean environment this practice would greatly increase the risk of misfire by putting unnecessary stress on all the needed connections and devices (600–1,000 ft of firing wire, an improvised, bulky, floating system for the RFD receiver, 180 ft of detonating cord, and 10 ft TDFD). Underwater demolition needs to be kept as simple and streamlined as possible, especially when divers and influence ordnance are added to the equation. ORM must ensure the safety of Sailors conducting these high risk training evolutions in addition to protection of marine life.

Mine neutralization training, as described in the regulations, involves neutralizing either a simulated mine on the surface or at depth. The ratio between surface detonations and bottom detonations (at depth) for EOD is about 50/50. This is dependent mainly on range availability and weather conditions. During neutralization of a surface mine, EOD divers are deployed and retrieved via helicopter. However, when helicopter assets are unavailable, a small boat is used as is done with neutralization of a mine at depth. During training exercises, regardless of whether a helicopter or small boat is used, a minimum of two small boats participate in the exercise.

For a surface mine neutralization training event involving a helicopter or a boat, the minimum time-delay that is reasonable for EOD divers to make their way outside of the detonation plume radius/human safety buffer zone (typically 1,000 ft (334 yd)) is 10 min. For mine neutralization training events at depth using small boats, the time-delay can be minimized to 5 min. However, this would require the instructors to handle initiation of the detonation and therefore would result in decreased training value for students.

The range area and associated support equipment are required for a 6–8 hour window. Training exercises are conducted during daylight hours for safety reasons.

The Navy is proposing to conduct MINEX activities using TDFDs. The number and description of MINEX events would remain otherwise unchanged from the 2011 Request for Letter of Authorization (DoN 2011) for each of the three Range Complexes.

Current and Proposed Modifications to Mitigation and Monitoring Measures Related to Mine Neutralizing Training

Current Mitigation Measures

Current mitigation measures for mine neutralizing training as required under the June 2011 LOAs issued to the Navy in the three Range Complexes included:

(A) This activity shall only occur in W–50 of the VACAPES Range Complex, Undet North and Undet South of the JAX Range Complex, and Mine Neutralization Box of Area 15 of the CHPT Range Complex.

(B) Observers shall survey the Zone of Influence (ZOI), a 700 yd (640 m) radius from detonation location for marine mammals from all participating vessels during the entire operation. A survey of the ZOI (minimum of 3 parallel tracklines 219 yd [200 m] apart) using support craft shall be conducted at the detonation location 30 minutes prior through 30 minutes post detonation. Aerial survey support shall be utilized whenever assets are available.

(C) Detonation operations shall be conducted during daylight hours only.

(D) If a marine mammal is sighted within the ZOI, the animal shall be allowed to leave of its own volition. The Navy shall suspend detonation exercises and ensure the area is clear of marine mammals for a full 30 minutes prior to detonation.

(E) No detonation shall be conducted using time-delay devices.

(F) Divers placing the charges on mines and dive support vessel personnel shall survey the area for marine mammals and shall report any sightings to the surface observers. These animals shall be allowed to leave of their own volition and the ZOI shall be clear of marine mammals for 30 minutes prior to detonation.

(G) No detonations shall take place within 3.2 nm (6 km) of an estuarine inlet.

(H) No detonations shall take place within 1.6 nm (3 km) of shoreline.

(I) Personnel shall record any protected species observations during the exercise as well as measures taken if species are detected within the ZOI.

Proposed Modification to Mitigation and Monitoring Measures

NMFS worked with the Navy and developed a series of modifications to improve monitoring and mitigation measures so that take of marine mammals will be minimized and that no risk of injury and/or mortality to marine mammal would result from the Navy's use of TDFD mine neutralization training exercises. The following proposed modifications to the mitigation and monitoring measures are specific to Mine Neutralization training exercises involving TDFDs conducted within the VACAPES, JAX, and CHPT Range Complexes.

(A) This activity shall only occur in W–50 of the VACAPES Range Complex, Undet North and Undet South of the JAX Range Complex, and Mine Neutralization Box of Area 15 of the CHPT Range Complex.

(B) Visual Observation and Exclusion Zone Monitoring.

The estimated potential for marine mammals to be exposed during MINEX training events is not expected to change with the use of TDFDs, as the same amount of explosives will be used and the same area ensonified/pressurized regardless of whether TDFDs are involved. This is due to the fact that estimated exposures are based on the probability of the animals occurring in the area when a training event is occurring, and this probability does not change because of a time-delay. However, what does change is the potential effectiveness of the current mitigation that is implemented to reduce the risk of exposure.

The locations selected for MINEX are all close to shore (~3–12 nm) and in shallow water (~ 10–20 m) in all three Range Complexes. Based on marine mammal monitoring during prior MINEX training activities and data from recent monitoring surveys, delphinids (mainly bottlenose dolphins) are the most likely species to be encountered in these areas. However, mitigation measures apply to all species and will be implemented if any marine mammal species is sighted.

The rationale used to develop new monitoring zones to reduce potential impacts to marine mammals when using a TDFD is as follows: The Navy has identified the distances at which the sound and pressure attenuate below NMFS injury criteria (*i.e.,* outside of that distance from the explosion, marine mammals are not expected to be injured). Here, the Navy identifies the distance that a marine mammal is likely to travel during the time associated with the TDFD's time delay, and that distance is added to the injury distance. If this enlarged area is effectively monitored, animals would be monitored and detected at distances far enough to ensure that they could not swim to the injurious zone within the time of the TDFD. Using an average swim speed of 3 knots (102 yd/min) for a delphinid, the Navy provided the approximate distance that an animal would typically travel within a given time-delay period (Table 1). Based on acoustic propagation modeling conducted as part of the

NEPA analyses for these Range Complexes, there is potential for injury to a marine mammal within 106 yd of a 5 lb detonation, 163 yd of a 10 lb detonation, and 222 yd of a 20 lb detonation. The buffer zones were calculated based on average swim speed of 3 knots (102 yd/min). The specific buffer zones based on charge size and the length of time delays are presented in Table 2.

TABLE 1—POTENTIAL DISTANCE BASED ON SWIM SPEED AND LENGTH OF TIME-DELAY

Species group	Swim speed	Time-delay	Potential distance traveled
Delphinid	102 yd/min	5	510 yd.
		6 min	612 yd.
		7 min	714 yd.
		8 min	816 yd.
		9 min	918 yd.
		10 min	1,020 yd.

TABLE 2—BUFFER ZONE RADIUS (YD) FOR TDFDS BASED ON SIZE OF CHARGE AND LENGTH OF TIME-DELAY

Charge size	Time-delay					
	5 min	6 min	7 min	8 min	9 min	10 min
5 lb	616 yd	718 yd	820 yd	922 yd	1,024 yd	1,126 yd.
10 lb	673 yd	775 yd	877 yd	979 yd	1,081 yd	1,183 yd.
20 lb	732 yd	834 yd	936 yd	1,038 yd	1,140 yd	1,242 yd.

However, it is possible that some animals may travel faster than the average swim speed noted above, thus there may be a possibility that these faster swimming animals would enter the buffer zone during time-delayed to detonation. In order to compensate for the swim distance potentially covered by faster swimming marine mammals, an additional correction factor was applied to increase the size of the buffer zones radii. Specifically, three sizes of buffer zones are proposed for the ease of monitoring operations based on size of charge and length of time-delay, with an additional buffer added to account for faster swim speed. These revised buffer zones are shown in Table 3. As long as animals are not observed within the buffer zones before the time-delay detonation is set, then the animals would be unlikely to swim into the injury zone from outside the area within the time-delay window.

TABLE 3—UPDATED BUFFER ZONE RADIUS (YD) FOR TDFDS BASED ON SIZE OF CHARGE AND LENGTH OF TIME-DELAY, WITH ADDITIONAL BUFFER ADDED TO ACCOUNT FOR FASTER SWIM SPEEDS

Charge size	Time-delay					
	5 min	6 min	7 min	8 min	9 min	10 min
5 lb	1,000 yd	1,000 yd	1,000 yd	1,000 yd	1,400 yd	1,400 yd.
10 lb	1,000 yd	1,000 yd	1,000 yd	1,400 yd	1,400 yd	1,400 yd.
20 lb	1,000 yd	1,000 yd	1,400 yd	1,400 yd	1,400 yd	1,450 yd.

1,000 yds: minimum of 2 observation boats.
1,400/1,450 yds: minimum of 3 observation boats or 2 boats and 1 helicopter.

The current mitigation measure specifies that parallel tracklines will be surveyed at equal distances apart to cover the buffer zone. Considering that the buffer zone for protection of a delphinid may be larger than specified in the current mitigation, a more effective and practicable method for surveying the buffer zone is for the survey boats to position themselves near the mid-point of the buffer zone radius (but always outside the detonation plume radius/human safety zone) and travel in a circular pattern around the detonation location surveying both the inner (toward detonation site) and outer (away from detonation site) areas of the buffer zone, with one observer looking inward toward the detonation site and the other observer looking outward. When using 2 boats, each boat will be positioned on opposite sides of the detonation location, separated by 180 degrees. When using more than 2 boats, each boat will be positioned equidistant from one another (120 degrees separation for 3 boats, 90 degrees separation for 4 boats, etc.). Helicopters will travel in a circular pattern around the detonation location when used.

During mine neutralization exercises involving surface detonations, a helicopter deploys personnel into the water to neutralize the simulated mine. The helicopter will be used to search for any marine mammals within the buffer zone. Use of additional Navy aircraft beyond those participating in the exercise was evaluated. Due to the limited availability of Navy aircraft and logistical constraints, the use of additional Navy aircraft beyond those participating directly in the exercise was deemed impracticable. A primary logistical constraint includes coordinating the timing of the detonation with the availability of the aircraft at the exercise location. Exercises typically last most of the day and would require an aircraft to be dedicated to the event for the entire day to ensure proper survey of the buffer zone 30 minutes prior to and after the detonation. The timing of the detonation may often shift throughout the day due to training tempo and other factors,

further complicating coordination with the aircraft.

Based on the above reasoning, the modified monitoring and mitigation for visual observation is proposed as the following:

A buffer zone around the detonation site will be established to survey for marine mammals. Events using positive detonation control will use a 700 yd radius buffer zone. Events using time-delay firing devices will use the table below to determine the radius of the buffer zone. Time-delays longer than 10 minutes will not be used. Buffer zones of 1,000 yds or less shall use a minimum of 2 boats to survey for marine mammals. Buffer zones greater than 1,000 yds radius shall use 3 boats or 1 helicopter and 2 boats to conduct surveys for marine mammals. Two dedicated observers in each of the boats will conduct continuous visual survey of the buffer zone for marine mammals for the entire duration of the training event. The buffer zone will be surveyed from 30 minutes prior to the detonation and for 30 minutes after the detonation. Other personnel besides the observers can also maintain situational awareness on the presence of marine mammals and sea turtles within the buffer zone to the best extent practical given dive safety considerations. If available, aerial visual survey support from Navy helicopters can be utilized, so long as to not jeopardize safety of flight.

When conducting the survey, boats will position themselves at the mid-point of the buffer zone radius (but always outside the detonation plume radius/human safety zone) and travel in a circular pattern around the detonation location surveying both the inner (toward detonation site) and outer (away from detonation site) areas of the buffer zone. To the extent practicable, boats will travel at 10 knots to ensure adequate coverage of the buffer zone. When using 2 boats in a 1,000 yds buffer zone, each boat will be positioned on opposite sides of the detonation location at 500 yds from the detonation point, separated by 180 degrees. When using 3 boats in a 1,400 or 1,450 yds buffer zone, each boat will be positioned equidistant from one another (120 degrees separation) at 700 or 725 yds respectively from the detonation point. Helicopter pilots will use established Navy protocols to determine the appropriate pattern (*e.g.,* altitude, speed, flight path, etc.) to search and clear the buffer zone of turtles and marine mammals.

(C) Mine neutralization training shall be conducted during daylight hours only.

(D) Maintaining Buffer Zone for 30 Minutes Prior to Detonation and Suspension of Detonation.

Visually observing the mitigation buffer zone for 30 min prior to the detonation allows for any animals that may have been submerged in the area to surface and therefore be observed so that mitigation can be implemented. Based on average dive times for the species groups that are most likely expected to occur in the areas where mine neutralization training events take place, (*i.e.* delphinids), 30 minutes is an adequate time period to allow for submerged animals to surface. Allowing a marine mammal to leave of their own volition if sighted in the mitigation buffer zone is necessary to avoid harassment of the animal.

Suspending the detonation after a TDFD is initiated is not possible due to safety risks to personnel. Therefore the portion of the measure that requires suspension of the detonation cannot be implemented when using a TDFD and should be removed, noting that revised mitigation measures will make it unnecessary to have to suspend detonation within the maximum of ten minutes between setting the TDFD and detonation.

Based on the above reasoning, the modified monitoring and mitigation for pre-detonation observation is proposed as the following:

If a marine mammal is sighted within the buffer zone, the animal will be allowed to leave of its own volition. The Navy will suspend detonation exercises and ensure the area is clear for a full 30 minutes prior to detonation.

When required to meet training criteria, time-delay firing devices with up to a 10 minute delay may be used. The initiation of the device will not start until the area is clear for a full 30 minutes prior to initiation of the timer.

(E) The requirement in the current LOA that ''no detonation shall be conducted using time-delayed devices'' is proposed to be deleted as the improved monitoring and mitigation measures will minimize the potential impacts to marine mammals and greatly reduce the likelihood of injury and/or mortality to marine mammals using TDFDs.

The availability of additional technological solutions that would enable suspension of the detonation when using a TDFD was evaluated. Currently there are no devices that would stop the timer if a marine mammal was sighted within the buffer zone after initiation of the timer.

The Navy states that procurement of new technology can take many years to be fielded. Joint service procurement can take approximately 3 years, with an additional 6 months when an item needs to go through the WSESRB (Weapon System Explosive Safety Review Board). For example, the Acoustic Firing System (AFS) has been in development for 10 years. It is supposed to be fielded ''as is'' to the Fleet in 2011, with the understanding that it has not met the minimum standards put forth. Once fielded, it will remain in the Product Improvement Process (PIP), which can take up to five years to have a finished product. This AFS will not be considered a true positive control firing device because current technology prevents a shorter time-delay than one minute in the firing cycle.

In 2012 another Radio Firing Device (RFD) will be fielded to the Fleet through a new program called the Special Mission Support Program. This RFD has a disposable receiver that can function in an Electronic Counter Measure (ECM) environment. Navy will evaluate and consider the use of the AFS and the new RFD for potential use as mitigation once they are fielded, but currently they are not options that can be implemented. Without further evaluation, it is not clear whether the new RFD could be used to replace TDFD at this moment.

(F) Diver and Support Vessel Surveys.

The Navy recommends, and NMFS concurs, revising this measure to clarify that it applies to divers only. The intent of the measure is for divers to observe the immediate, underwater area around the detonation site for marine mammals while placing the charge.

The modified mitigation measures is provided below:

Divers placing the charges on mines will observe the immediate, underwater area around the detonation site for marine mammals and will report any sightings to the surface observers.

(G) No detonations shall take place within 3.2 nm (6 km) of an estuaries inlet.

(H) No detonations shall take place within 1.6 nm (3 km) of shoreline.

(I) Personnel shall record any protected species observations during the exercise as well as measures taken if species are detected within the zone of influence (ZOI).

Take Estimates

There is no change for marine mammal take estimates from what were analyzed in the final rules (VACAPES: 74 FR 28328; JAX: 74 FR 28349; CHPT: 74 FR 28370; June 15, 2009) for mine neutralization training activities in all these three Range Complexes. Take estimates were based on marine

mammal densities and distribution data in the action areas, computed with modeled explosive sources and the sizes of the buffer zones.

The Comprehensive Acoustic System Simulation/Gaussian Ray Bundle (OAML, 2002) model, modified to account for impulse response, shock-wave waveform, and nonlinear shock-wave effects, was run for acoustic-environmental conditions derived from the Oceanographic and Atmospheric Master Library (OAML) standard databases. The explosive source was modeled with standard similitude formulas, as in the Churchill FEIS. Because all the sites are shallow (less than 50 m), propagation model runs were made for bathymetry in the range from 10 m to 40 m.

Estimated zones of influence (ZOIs; defined as within which the animals would experience Level B harassment) varied with the explosive weights, however, little seasonal dependence was found among all Range Complexes. Generally, in the case of ranges determined from energy metrics, as the depth of water increases, the range shortens. The single explosion TTS-energy criterion (182 dB re 1 microPa^2-sec) was dominant over the pressure criteria and therefore used to determine the ZOIs for the Level B exposure analysis.

The total ZOI, when multiplied by the animal densities and total number of events, provides the exposure estimates for that animal species for each specified charge in the VACAPES, JAX, and CHPT Range Complexes (Table 4). Since take numbers were estimated without considering marine mammal monitoring and mitigation measures, therefore, the additional monitoring and mitigation measures and the use of TDFD for mine neutralization training would not change the estimated takes from the original final rules for JAX (74 FR 28349; June 15, 2009) and CHPT (74 FR 28370; June 15, 2009) Range Complexes and from the interim final rule for VACAPES Range Complex (76 FR 33266; June 8, 2011).

TABLE 4—ESTIMATED TAKES OF MARINE MAMMALS THAT COULD RESULT FROM MINEX

Species/Training Operation	Potential exposures @182 dB re 1 μPa^2-s or 23 psi	Potential exposures @205 dB re 1 μPa^2-s or 13 psi	Potential exposures @30.5 psi
VACAPES Range Complex:			
Pantropical spotted dolphin	4	1	0
Bottlenose dolphin	2	0	0
Clymene dolphin	2	0	0
JAX Range Complex:			
Atlantic spotted dolphin	2	0	0
Bottlenose dolphin	2	0	0
CHPT Range Complex:			
Atlantic spotted dolphin	1	0	0

Analysis and Negligible Impact Determination

Pursuant to NMFS' regulations implementing the MMPA, an applicant is required to estimate the number of animals that will be ''taken'' by the specified activities (*i.e.,* takes by harassment only, or takes by harassment, injury, and/or death). This estimate informs the analysis that NMFS must perform to determine whether the activity will have a ''negligible impact'' on the species or stock. Level B (behavioral) harassment occurs at the level of the individual(s) and does not assume any resulting population-level consequences, though there are known avenues through which behavioral disturbance of individuals can result in population-level effects. A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), or any of the other variables mentioned in the first paragraph (if known), as well as the number and nature of estimated Level A takes, the number of estimated mortalities, and effects on habitat.

The aforementioned additional mitigation and monitoring measures will increase the buffer zone to account for marine mammal movement and increase marine mammal visual monitoring efforts to ensure that no marine mammal would be in a zone where injury and/or mortality could occur as a result of time-delayed detonation.

In addition, the estimated exposures are based on the probability of the animals occurring in the area when a training event is occurring, and this probability does not change based on the use of TDFDs or implementation of mitigation measures (*i.e.,* the exposure model does not account for how the charge is initiated and assumes no mitigation is being implemented). Therefore, the potential effects to marine mammal species and stocks as a result of the proposed mine neutralization training activities are the same as those analyzed in the final rules governing the incidental takes for these activities. Consequently, NMFS believes that the existing analyses in the final rules do not change as a result of the proposed LOAs to include mine neutralization training activities using TDFDs.

Further, there will be no increase of marine mammal takes as analyzed in previous rules governing NMFS issued incidental takes that could result from the Navy's training activities within these Range Complexes by using TDFDs.

Based on the analyses of the potential impacts from the proposed mine neutralization training exercises conducted within the Navy's VACAPES, JAX, and Cherry Point Range Complexes, especially on the proposed improvement on marine mammal monitoring and mitigation measures, NMFS has preliminarily determined that the modification of the Navy's current LOAs to include taking of marine mammals incidental to mine neutralization training using TDFD within the above Range Complexes will

have a negligible impact on the marine mammal species and stocks present in these action areas, provided that additional mitigation and monitoring measures are implemented.

ESA

There are six ESA-listed marine mammal species, three sea turtle species, and a fish species that are listed as endangered under the ESA with confirmed or possible occurrence in the VACAPES, JAX, and CHPT Range Complexes: Humpback whale, North Atlantic right whale, blue whale, fin whale, sei whale, sperm whale, loggerhead sea turtle, leatherback sea turtle, the Kemp's ridley sea turtle, and the shortnose sturgeon.

Pursuant to Section 7 of the ESA, NMFS has begun consultation internally on the issuance of the modified LOAs under section 101(a)(5)(A) of the MMPA for these activities. Consultation will be concluded prior to a determination on the issuance of the modified LOAs.

NEPA

NMFS participated as a cooperating agency on the Navy's Final Environmental Impact Statements (FEIS's) for the VACAPES, JAX, and CHPT Range Complexes. NMFS subsequently adopted the Navy's EIS's for the purpose of complying with the MMPA. For the modification of the LOAs, which include TDFDs, but also specifically add monitoring and mitigation measures to minimize the likelihood of any additional impacts from TDFDs, NMFS has determined that there are no changes in the potential effects to marine mammal species and stocks as a result of the proposed mine neutralization training activities using TDFDs. Therefore, no additional NEPA analysis will be required, and the information in the existing EIS's remains sufficient.

Preliminary Determination

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat and dependent upon the implementation of the mitigation measures, NMFS preliminarily finds that the total taking from Navy mine neutralization training exercises utilizing TDFDs in the VACAPES, JAX, and CHPT Range Complexes will have a negligible impact on the affected marine mammal species or stocks. NMFS has proposed issuance of three modifications to the LOAs to allow takes of marine mammals incidental to the Navy's mine neutralization training exercises using TDFDs, provided that the proposed improvements to the monitoring and mitigation measures are implemented.

Dated: November 2, 2011.

Helen Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–28778 Filed 11–4–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–T–2011–0063]

Trademark Manual of Examining Procedure, Eighth Edition

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice.

SUMMARY: To provide information on trademark examination policy and procedure, the United States Patent and Trademark Office (''USPTO'') issued the eighth edition of the *Trademark Manual of Examining Procedure* (''TMEP''), and made available an archived copy of the seventh edition, on October 15, 2011.

ADDRESSES: The USPTO prefers that any suggestions for improving the form and content of the TMEP be submitted via electronic mail message to *tmtmep@uspto.gov.* Written comments may also be submitted by mail addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313–1451, marked to the attention of Editor, *Trademark Manual of Examining Procedure,* or by hand delivery to the Trademark Assistance Center, Concourse Level, James Madison Building-East Wing, 600 Dulany Street Alexandria, Virginia, marked to the attention of Editor, *Trademark Manual of Examining Procedure.*

FOR FURTHER INFORMATION CONTACT: Catherine P. Cain, Office of the Deputy Commissioner for Trademark Examination Policy, by electronic mail at: *catherine.cain@uspto.gov;* or by mail addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313–1451, marked to the attention of Catherine P. Cain.

SUPPLEMENTARY INFORMATION: On October 15, 2011, the USPTO issued the eighth edition of the TMEP, which provides USPTO trademark examining attorneys, trademark applicants, and attorneys and representatives for trademark applicants with a reference on the practices and procedures for prosecution of applications to register marks in the USPTO. The TMEP contains guidelines for examining attorneys and materials in the nature of information and interpretation, and outlines the procedures which examining attorneys are required or authorized to follow in the examination of trademark applications.

The eighth edition incorporates USPTO trademark practice and relevant case law reported prior to September 1, 2011. The policies stated in this revision supersede any previous policies stated in prior editions, examination guides, or any other statement of USPTO policy, to the extent that there is any conflict. The eighth edition also includes a collaboration tool, offered through a program called IdeaScale®, which permits the user community to provide public comments that are accessible to both the user community and the Office. The collaboration tool is currently open to Chapters 500, 900, and 1900. The eighth edition of the TMEP may be viewed or downloaded free of charge from the USPTO Web site at *http://tess2.uspto.gov/tmdb/tmep/.*

An archived copy of the seventh edition of the TMEP also remains available for reference. Links to the seventh edition, as well as to the fourth, fifth, and sixth editions, are on the USPTO Web site at *http://www.uspto.gov/trademarks/resources/TMEParchives.jsp.*

Dated: November 1, 2011.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2011–28775 Filed 11–4–11; 8:45 am]

BILLING CODE 3510–16–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

DATES: *Time and Date:* Wednesday, November 9, 2011; 2 p.m.–3 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Closed to the Public.

Matter To Be Considered

Compliance Status Report

The Commission staff will brief the Commission on the status of compliance matters.

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: November 3, 2011.

Todd A Stevenson,

Secretary.

[FR Doc. 2011–28845 Filed 11–3–11; 11:15 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Notice of Intent To Prepare a Draft Environmental Impact Statement/ Environment Impact Report (DEIS/ DEIR) for a Permit Application for the Proposed San Elijo Lagoon Restoration Project, City of Encinitas, San Diego County, CA

AGENCY: United States Army Corps of Engineers, Los Angeles District, Regulatory Division, Defense.

ACTION: Notice of Intent (NOI).

SUMMARY: The United States (U.S.) Army Corps of Engineers (Corps), in conjunction with the County of San Diego Department of Parks and Recreation (County Parks), is preparing a joint Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the proposed San Elijo Lagoon Restoration Project (SELRP). The Corps will be lead agency under National Environmental Protection Act (NEPA) and County Parks will be the lead agency under the California Environmental Quality Act (CEQA). The development of the EIS/EIR and associated technical studies are being completed to determine the Agency Preferred Alternative, which would improve and/or restore wetland functions and services within the San Elijo Lagoon. Given the complexity of the alternatives analysis and range of potentially significant issues, the appropriate environmental document was determined by the Corps and County Parks to be a combined EIS/EIR, respectively. The Corps and the County Parks have agreed to jointly prepare the EIS/EIR to optimize efficiency and avoid duplication. The EIS/EIR is intended to be sufficient in scope to address federal, state, and local requirements for environmental analysis and permitting.

Implementing the Agency Preferred Alternative would require a Department of the Army permit pursuant to Section 404 of the Clean Water Act, which regulates the discharge of dredged, excavated, or fill material in wetlands, streams, rivers, and other waters of the U.S. and the potential impacts on the human environment from such activities. To be authorized by the Corps, the Agency Preferred Alternative must also comply with the Section 404(b)(1) Guidelines (40 Code of Federal Regulations [CFR] Part 230) and may not be contrary to the public interest.

Federal agencies coordinating in the development of the EIS include the U.S. Fish and Wildlife Service (Service), National Marine Fisheries Service (NMFS), and Environmental Protection Agency (EPA). State agencies coordinating in the development of the EIR include Department of Fish and Game (CDFG), California Coastal Commission (CCC), San Diego Regional Water Quality Control Board (RWQCB), State Water Resources Control Board, California Department of Transportation (Caltrans), and San Diego Association of Governments (SANDAG).

The EIR/EIS is currently evaluating three alternative restoration designs, the No Project/No Action alternative, and associated maintenance and long-term management and maintenance measures. In addition, alternatives are being evaluated to determine if project phasing is necessary to maintain adequate habitat for sensitive aquatic species, including light footed clapper rail (*Rallus longirostris levipes*) and potentially western snowy plovers (*Charadrius alexandrines nivosus*) and California least terns (*Sterna antillarum browni*) . The study area encompasses approximately 960 acres within and adjacent to the Reserve, but final project size may vary, depending on the outcome of the alternatives analysis. Additional details and alternative designs are provided in Section 4. Should the project receive a permit, it is anticipated that construction of the SELRP would begin in fall 2014. The study area boundaries for the SELRP are generally defined to include publicly owned parcels where restoration activities could occur.

FOR FURTHER INFORMATION CONTACT: Comments and questions regarding scoping of the Draft EIS/EIR may be addressed to Ms. Michelle Mattson, Senior Project Manager, U.S. Army Corps of Engineers, Los Angeles District, Regulatory Division, Carlsbad Field Office, Attn: CESPL–2009–00575–MLM, 6010 Hidden Valley Road, Suite 105, Carlsbad, CA 92011 or comment letters can also be sent via electronic mail to *Michelle.L.Mattson@usace.army.mil.* The project title ''San Elijo Lagoon Restoration Project, CESPL–2009–00575–MLM'' should be included in the electronic mail's subject line and the commenter's physical mailing address within the body of the letter. Michelle Mattson can be reached at (760) 602–4835. Comments and questions can also be sent to Ms. Megan Hamilton, County of San Diego Department of Parks and Recreation, 5500 Overland Avenue, Suite 410, San Diego CA 92123 or via electronic mail to *Megan.Hamilton@sdcounty.ca.gov.* Megan Hamilton can be reached at (858) 966–1377.

SUPPLEMENTARY INFORMATION:

1. Project Site and Background Information: San Elijo Lagoon is located in the city of Encinitas, San Diego County, California. The lagoon is the terminus of the Escondido Creek and La Orilla Creek watersheds at the Pacific Ocean. The study area is composed of approximately 961 acres, which are separated into four basins or areas (East Basin, Central Basin, West Basin, and Coastal Area). The lagoon provides habitat for resident and migratory species, some of which are sensitive or listed as federally-threatened or endangered under the Endangered Species Act (ESA).

Due to encroachment by development, restricted tidal influence, and the increase of freshwater from the watershed, the San Elijo Lagoon has gradually degraded over time. Tidal influence has been restricted by infrastructure and development at the inlet of the lagoon. The Pacific Coast Highway (PCH), the North County Transit District (NCTD) railroad, and Interstate 5 (I–5) all traverse the lagoon and further modify tidal and freshwater circulation patterns and increased sediment accumulation from the watershed. Freshwater input has increased as a result of residential and commercial land uses in the 77-square-mile hydrologic watershed. Because of these hydrologic changes, lagoon habitat is rapidly transitioning from mudflats to mid-marsh habitat through the rapid expansion of cordgrass (*Spartina* spp.) and pickleweed (*Sarcoconia pacifica*) and the East Basin supports large areas of freshwater marsh vegetated primarily by cattails (*Typha* spp.). The changes have also decreased the quality of water in the lagoon causing elevated bacteria levels and increased the occurrences of beach closures during high flow events.

Mechanical breaching of the ocean inlet is routinely performed to maintain tidal flushing within the lagoon, but benefits are only temporarily realized due to the physical and hydrological changes previously mentioned. If no action is taken to restore the lagoon, functions and services will continue to degrade, further reducing the diversity of estuarine habitats and increasing freshwater wetland and riparian habitats. Sensitive flora and fauna currently dependent on the estuarine conditions will continue to be adversely

affected. The SELRP is an effort to restore estuarine functions and services to the greatest extent practicable in light of permanent constraints. Depending on the restoration alternative chosen through development of the Draft EIS/EIR, the SELRP would improve tidal influence by modifying and maintaining the existing inlet of the lagoon or by constructing a new, permanently open lagoon inlet. Habitat diversity and other wetland functions and services would also be improved by modifying existing tidal channels, grading new tidal channels, and/or by grading areas specified by a range of tide elevations.

The basic project purpose of the proposed SELRP is to restore tidal wetlands; this is a water dependent activity. The overall project purpose of the SELRP is to enhance and restore the physical and biological functions and services of the lagoon by increasing the tidal prism to support a diverse range of habitat types.

The overarching goal of the SELRP is to protect, restore, and then maintain, via and adaptive management the San Elijo Lagoon ecosystem and the adjacent uplands to support a diversity of estuarine and brackish marsh habitats and associated native species of southern California.

This goal can be further refined into three categories of objectives:

1. Physical restoration of lagoon estuarine hydrologic functions,

2. Biological restoration of lagoon estuarine habitats, and

3. Management and maintenance of the lagoon to ensure long-term viability of the restoration efforts.

2. Proposed Action: Three restoration alternatives and the No Project/No Action alternative are being evaluated in the EIR/EIS. All the restoration alternatives are designed to counteract the conversion trend to freshwater habitats and restore a range of estuarine habitat types. Therefore, increasing tidal influence is the primary action being evaluated to restore ecological functions and services. Two alternatives retain the existing tidal inlet and one constructs a new inlet further south. Restoration alternatives evaluate varying degrees of dredging and filling portions of the three basins (West, Central, and East Basin) to restore or create a diversity of estuarine habitat types. Excess sediment from dredging could be discharged on the adjacent beach or in the nearshore zone west of the lagoon, if it is identified as suitable beach sand material. Maintenance and adaptive management strategies are also being evaluated for each alternative (i.e. new inlet channel maintenance would differ from the existing inlet channel maintenance).

Through the EIS/EIR process, an Agency Preferred Alternative will be chosen and a Restoration Plan will be developed. The Restoration Plan will be consistent with the goals and objectives listed above and will fit within the overall management strategies identified in the *San Elijo Lagoon Enhancement Plan* (County Parks 1996) and the *San Elijo Lagoon Action Plan* (San Elijo Lagoon Conservancy 1998).

3. Issues: A number of potential environmental issues will be addressed in the EIS/EIR for each alternative. Additional issues may be identified during the scoping process, but issues initially identified as potentially significant or that are believed to be of local concern are as follows:

- Geology and Soils: Permanent impacts through the removal of sediment accumulated in the lagoon and on-going impacts resulting from as-needed maintenance activities.
- Coastal Processes: Temporary impacts during construction, permanent impacts depending on tidal inlet location, and on-going impacts resulting from as needed maintenance activities.
- Hydrology: Temporary impacts during construction, permanent changes in water circulation, and on-going impacts resulting from as-needed maintenance of the tidal inlet and/or interior dredging.
- Water & Aquatic Sediment Quality: Impacts during construction, including turbidity, and potential impacts resulting from as-needed maintenance activities.
- Aquatic & Terrestrial Biological Resources: Temporary and permanent impacts to existing species.
- Cultural & Paleontological Resources: Impacts to archaeological resources, human remains, and sacred sites.
- Land Use: Temporary or permanent impacts to beach use depending on inlet location.
- Recreation: Temporary impacts to existing trail use during construction and potential on-going impacts resulting from as-needed maintenance activities.
- Visual Resources: Temporary impacts during construction and permanent impacts associated with changes in vegetation communities and regular tidal flooding.
- Transportation and Traffic: Impacts during construction and potential on-going impacts resulting from as-needed maintenance activities.
- Air Quality/Greenhouse Gas Emissions: Impacts during construction and on-going impacts resulting from as-needed maintenance activities.
- Noise: Impacts during construction and on-going impacts resulting from dredging or other construction equipment during as-needed maintenance activities.
- Hazards and Hazardous Materials: Impacts during construction and on-going impacts resulting from as-needed maintenance activities.
- Public Services and Utilities: Impacts during construction and on-going impacts resulting from as-needed maintenance activities.

4. Alternatives: Since 1996, various interested parties have devised restoration concepts and considered alternative configurations of infrastructure that traverse the lagoon. Through an intensive process, four conceptual alternatives have been identified to be carried forward for engineering refinement and environmental evaluation:

- Alternative 1A—Intertidal Alternative (existing inlet)
- Alternative 1B—Habitat Diversity Alternative (existing inlet)
- Alternative 2A—Habitat Diversity Alternative (inlet relocated south)
- No Project/No Action

There are common design features that would be implemented in each alternative, such as micro-grading and the use of short cobble-blocking structures at the inlet. The range and characteristics of the alternatives addressed in the EIS/EIR will be more fully developed based on input from the scoping process and specialized hydrological and biological technical studies that are underway.

5. Scoping Process: The Corps and County Parks will jointly conduct a series of public scoping meetings to receive public comments regarding the appropriate scope and content for the SELRP Draft EIS/EIR and to assess public concerns. Additionally, a public hearing will be held during the public comment period once the Draft EIS/EIR is released. Participation in the public meetings by federal, state, and local agencies; Native American Tribes; and other interested organizations and persons is encouraged. Parties interested in being added to the electronic mail notification list for any projects associated with the SELRP can register at *http://www.spl.usace.army.mil/regulatory/* under the Public Notice tab, Distribution List registration. This list will be used in the future to notify the public about scheduled hearings and availability of future public notices.

Parties interested in obtaining additional information about the SELRP can also visit *http://www.sanelijo.org/restoration.*

A series of public scoping meetings will be held on the following dates and locations:

1. Carlsbad: November 15, 2011 at 1 p.m., U.S. Fish & Wildlife Service, Conference Room 1, 6010 Hidden Valley Road, Suite 101, Carlsbad, California 92011.

2. Encinitas: November 29, 2011 at 6 p.m., City of Encinitas Community Center, 1140 Oakcrest Park Drive, Encinitas, CA 92024.

3. Solana Beach: December 1, 2011 at 6 p.m., City of Solana Beach Council Chambers, 635 South Highway 101, Solana Beach, CA 92075.

Comments on the proposed action, alternatives, or any additional concerns should be submitted in writing. Written comment letters will be accepted through December 18, 2011.

The following permits and consultations are expected:

- Corps CWA Section 404 Permit
- RWQCB CWA Section 401 Water Quality Certification
- Service Section 7 Consultation
- National Historic Preservation Act Section 106 consultation
- CDFG Section 1600 Streambed Alteration Agreement
- CCC Development Permit
- State Lands Commission Lease
- U.S. Coast Guard Navigation Permit (new inlet only)
- State Department of Parks and Recreation Encroachment Permit

6. Availability of the DEIS/DEIR: The Draft EIS/EIR is expected to be published and circulated by fall 2012, and public meetings will be held after its publication.

Dated: October 26, 2011.

Mark Cohen,

Deputy Chief, Regulatory Division, Corps of Engineers.

[FR Doc. 2011–28741 Filed 11–4–11; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment Request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 6, 2012.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: November 1, 2011.

Darrin King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Office of Elementary and Secondary Education

Type of Review: Extension.

Title of Collection: College Assistance Migrant Program (CAMP).

OMB Control Number: 1810–0689.

Agency Form Number(s): N/A.

Frequency of Responses: Annually.

Affected Public: State, Local or Tribal Government.

Total Estimated Number of Annual Responses: 37.

Total Estimated Annual Burden Hours: 1,184.

Abstract: For the College Assistance Migrant Program, a customized Annual Performance Report that goes beyond the generic 524B is requested to facilitate the collection of more standardized and comprehensive data tools that provide information for the Government Performance Reporting Act, which improves the overall quality of data collection, and increases the quality and quantity of data that may be used to inform policy decisions.

Copies of the proposed information collection request may be accessed from *http://edicsWeb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4747. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to (202) 401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339.

[FR Doc. 2011–28753 Filed 11–4–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13417–002]

Western Technical College; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Minor License.

b. *Project No.:* 13417–002.

c. *Date filed:* October 21, 2011.

d. *Applicant:* Western Technical College.

e. *Name of Project:* Angelo Dam Hydroelectric Project.

f. *Location:* The project would be located on the La Crosse River in the

Township of Angelo, Monroe County, Wisconsin at an existing dam owned by Monroe County and regulated by the Wisconsin Department of Natural Resources. The project would not occupy Federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Western Technical College, c/o Mr. Michael Pieper, Vice President, Finance and Operations, 400 Seventh Street North, P.O. Box C–0908, La Crosse, Wisconsin 54602–0908; *Phone:* (608) 785–9120.

i. *FERC Contact:* Isis Johnson, (202) 502–6346, *isis.johnson@ferc.gov*.

j. *Cooperating agencies:* Federal, State, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. Pursuant to Section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* December 20, 2011.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–(866) 208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

m. The application is not ready for environmental analysis at this time.

n. The project would be located at an existing dam currently owned by Monroe County. The dam was built in 1854, and acquired in the 1920s by Northern States Power who rebuilt, owned, and operated a hydroelectric project at that location until it was abandoned and the generating equipment was removed, in 1969. In 1998, Monroe County rehabilitated the dam and installed new Tainter gates with cable drum hoists.

The existing Angelo dam is an earthen embankment with a maximum height of 14 feet and a total length of 507 feet. The spillway is constructed of reinforced concrete and consists of four, 13.5-foot-wide by 11.4-foot-high bays with 13.5-foot-wide by approximately 7-foot-high steel tainter gates. The proposed project would consist of: (1) A 20-foot by 20-foot by 20-foot forebay; (2) restoration of the intake structure; (3) new trash racks; (4) a 20-foot by 40-foot by 28-foot powerhouse located at the right abutment of the dam; and (5) a 205-kW vertical double regulated Kaplan turbine. The projected annual energy generation would be 948,760 kilowatt-hours. The project would interconnect to an existing 2.7kV distribution line owned by Northern States Power, at a point adjacent to the powerhouse.

The existing reservoir has a surface area of 52 acres, normally stores approximately 140 acre-feet at the spillway crest elevation, and has a normal operating range from 793 to 793.6 feet above mean sea level (msl). The maximum storage capacity is 450 acre-feet (based on an elevation of 796 feet msl at the top of the dam). The project would operate in a run-of-river mode and generate power using flows between 168 cubic feet per second (cfs) and 64 cfs. Flows greater than 168 cfs would be spilled.

o. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. With this notice, we are initiating consultation with the Wisconsin State Historic Preservation Officer (SHPO), as required by § 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36, CFR, at 800.4.

q. *Procedural schedule:* The application will be processed according to the following preliminary Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Notice of Acceptance	December 2011.
Scoping Document 1 issued for comments	February 2012.
Comments on Scoping Document 1	March 2012.
Scoping Document 2 and additional information request, if necessary	April 2012.
Notice of Ready for Environmental Analysis	June 2012.
Commission issues a single EA	January 2013.

Dated: October 28, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28692 Filed 11–4–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL12–6–000]

Seneca Power Partners, L.P. v. *New York Independent System Operator, Inc.;* Notice of Complaint

Take notice that on October 27, 2011, pursuant to sections 206 and 306 of the Federal Power Act, 16 U.S.C. 824e and 825e and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedures, 18 CFR 385.206, Seneca Power Partners, L.P. (Complainant) filed a complaint against the New York Independent System Operator, Inc. (Respondent), alleging that the Respondent is violating its Tariff and engaging in unduly discriminatory conduct in improperly deriving and unilaterally modifying the reference prices used by the Respondent to compensate Complainant's Batavia generator, which has been identified as needed for reliability.

The Complainant certifies that copies of the complaint were served on the Respondent and the New York Public Service Commission.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 28, 2011.

Dated: October 28, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28688 Filed 11–4–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL12–8–000]

DC Energy, LLC; DC Energy Mid-Atlantic, LLC v. *PJM Interconnection, L.L.C.;* Notice of Complaint

Take notice that on October 27, 2011, pursuant to sections 206 and 306 of the Federal Power Act (FPA), 16 U.S.C. 824e and 825e and Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.206 (2011), DC Energy, LLC (DC Energy) and DC Energy Mid-Atlantic LLC (DCE Mid-Atlantic) (collectively Complainants) filed a Complaint against the PJM Interconnection, L.L.C. (PJM) (Respondent) concerning the applicability of certain charges to virtual transactions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 16, 2011.

Dated: October 28, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28690 Filed 11–4–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD12–2–000]

Notice of Intent To Update the Upland Erosion Control and Revegetation and Maintenance Plan and the Wetland and Waterbody Construction and Mitigation Procedures and Request for Comments

The staff of the Office of Energy Projects is in the process of reviewing its Upland Erosion Control, Revegetation and Maintenance Plan (Plan) and Wetland and Waterbody Construction and Mitigation Procedures (Procedures), dated January 17, 2003, to determine if there are appropriate updates or improvements to be made at this time. In accordance with Order 603,[1] the staff is asking for public input and suggestions for modifications to the Plan and Procedures from the natural gas industry, federal, state and local agencies, environmental consultants, inspectors, construction contractors, and other interested parties with special expertise with respect to environmental

[1] Revision Of Existing Regulations Under Part 157 and Related Sections of the Commission's Regulations Under the Natural Gas Act, Commission Order No. 603, Docket No. RM98–9–000, issued April 29, 1999. Noticed in the **Federal Register** on May 14, 1999. 64 FR 26572.

issues commonly associated with pipeline projects. Please note that this comment period will close on January 18, 2012.

The Plan and Procedures are referred to at 18 Code of Federal Regulations (CFR) 380.12(i)(5) and 380.12(d)(2), respectively, as well as 18 CFR 157.206(b)(3)(iv). Full texts of the current versions of the Plan and Procedures can be viewed on the Federal Energy Regulatory Commission (FERC or Commission) Web site at *http://www.ferc.gov/industries/gas/enviro/guidelines.asp*.

We anticipate issuing our draft changes to the Plan and Procedures in early 2012 and will make them available for public comment. We will then consider all timely comments on the drafts before issuing the final versions.

Interested parties can help us determine the appropriate updates and improvements to make by providing us comments or suggestions that focus on the specific sections requiring clarification, updates to reflect current laws and regulations, or improved measures to avoid or minimize environmental impacts. The more specific your comments, the more useful they will be. A detailed explanation of your submissions and/or any references of scientific studies associated with your comments would greatly help us with this process.

For your convenience, there are three methods you can use to submit your comments to the Commission. In all instances, please reference the docket number (AD12–2–000) with your submission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*. Please include your name and email address so we can include you in future notices regarding our planned revisions.

(1) You may file your comments electronically by using the eComment feature, which is located on the Commission's Web site at *www.ferc.gov* under the link to Documents and Filings. An eComment is an easy method for interested persons to submit brief, text-only comments;

(2) You may file your comments electronically by using the *eFiling* feature, which is located on the Commission's Web site at *www.ferc.gov* under the link to *Documents and Filings.* With eFiling you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.*'' You will be asked to select the type of filing you are making. A comment in response to this notice is considered a ''Comment on a Filing''; or

(3) You may file a paper copy of your comments at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

All of the information related to the proposed updates to the Plan and Procedures and submitted comments can be found on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (*i.e.,* AD12–2). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Dated: October 31, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28693 Filed 11–4–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2146–132]

Alabama Power Company; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Project Use of Project Lands and Waters.

b. *Project No:* 2146–132.

c. *Date Filed:* May 18, 2011 and supplemented on September 30, and October 27, 2011.

d. *Applicant:* Alabama Power Company.

e. *Name of Project:* Coosa River Project.

f. *Location:* At Curley's Cove RV Park near the town of Cedar Bluff in Cherokee County, AL.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Keith E. Bryant, Alabama Power Company, 600 18th Street North, Birmingham, AL 35203. *Phone:* (205) 257–1403. *email: kebryant@southernco.com.*

i. *FERC Contact:* Tara Perry at (202) 502–6546; *email: tara.perry@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* November 28, 2011.

All documents may be filed electronically via the Internet. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp*. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments.

Please include the project number (P–2146–132) on any comments, motions, or recommendations filed.

k. *Description of the Application:* Alabama Power Company has filed a request for Commission approval to authorize Mr. David Debter (applicant) to expand an existing RV campground on 1.8 acres and construct a new picnic area on .3 acres at Curley's Cove RV Park. Construction will include 30 new RV campsite lots, each with a 20 Ft x 40 Ft concrete pad, utility (water, electric, and wastewater) connections, a new 1,500 gallon septic tank, a gravel road throughout the site, and streetlights between every other site. The day-use picnic area will include a pedestrian bridge (40 ft x 8 ft concrete deck on driven piles) from the RV Park, 4 open-sided 12 x 12 gazebos with 1 picnic table each, and a 20 ft x 30 ft pavilion with up to 5 picnic tables.

l. *Location of the Application:* This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/*

esubscription.asp to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) Bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: October 28, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28691 Filed 11–4–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL12–7–000]

Hess Corporation v. *PJM Interconnection, L.L.C.; Notice of Petition for Declaratory Order and Complaint*

Take notice that on October 26, 2011, pursuant to Rules 207(a)(2) and 212 of the Rules of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedures, 18 CFR 385.207(a)(2) and 385.212, Hess Corporation (Complainant) filed a Petition for Declaratory Order requesting that the Commission determine that PJM Interconnection, L.L.C.'s (Respondent) current Open Access Transmission Tariff (OATT) permits the Respondent to make a minor adjustment to two phase angle regulators (PAR) owned by Public Service Electric and Gas Company for purposes of modeling Complainant's pending interconnection request for a proposed 625 MW gas-fired electric generating facility to be located in Newark, New Jersey. In the alternative, pursuant to section 206 of the Federal Power Act, 16 U.S.C. 824e and Rule 206 of the Commission's Rules of Practice and Procedure, 18 CFR 385.206, Complainant filed a formal complaint, requesting that the Commission revise the Respondent's Tariff and/or associated Manuals as necessary to require the Complainant to adjust PARs to accommodate generator interconnections, such as the interconnection of the Newark Energy Center, when such adjustment would not harm the reliability of the Respondent's system or impose costs on other customers.

The Complainant certifies that copies of the complaint were served on the contacts for the Respondent as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 25, 2011.

Dated: October 28, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28689 Filed 11–4–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9488–3]

Agency Information Collection Activities OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the Office of Management and Budget (OMB) responses to Agency Clearance requests, in compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Rick Westlund (202) 566–1682, or email at

westlund.rick@epa.gov and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency Clearance Requests

OMB Approvals

EPA ICR Number 1363.21; Toxic Chemical Release Reporting; 40 CFR part 372; was approved on 10/14/2011; OMB Number 2025–0009; expires on 10/31/2014; Approved without change.

EPA ICR Number 0318.12; Clean Watersheds Needs Survey (Renewal); was approved on 10/20/2011; OMB Number 2040–0050; expires on 10/31/2014; Approved with change.

EPA ICR Number 0820.11; Hazardous Waste Generator Standards (Renewal); 40 CFR 262.34, 262.40(c), 262.43, 262.44(c), 262.53–262.57, 262.60, 265.190–265.193, and 265.196; was approved on 10/25/2011; OMB Number 2050–0035; expires on 10/31/2014; Approved without change.

EPA ICR Number 1284.09; NSPS for Polymeric Coating of Supporting Substrates Facilities; 40 CFR part 60, subparts A and VVV; was approved on 10/25/2011; OMB Number 2060–0181; expires on 10/31/2014; Approved without change.

EPA ICR Number 1630.10; Oil Pollution Act Facility Response Plans (Renewal); 40 CFR 112.20 and 112.21; was approved on 10/25/2011; OMB Number 2050–0135; expires on 10/31/2014; Approved without change.

EPA ICR Number 0559.11; Application for Reference and Equivalent Method Determination (Renewal); 40 CFR 53.4, 53.9 (f),(h),(i), 53.14, 53.15, and 53.16(a)–(d),(f); was approved on 10/31/2011; OMB Number 2080–0005; expires on 10/31/2014; Approved without change.

Comment Filed

EPA ICR Number 2436.01; Revisions to the Emergency and Hazardous Chemical Inventory Forms (Tier I and Tier II), Section 312 of the Emergency Planning and Community Right-to-Know Act (EPCRA) (Proposed Rule); OMB filed comment on 10/25/2011.

EPA ICR Number 2421.01; Carbon Dioxide (CO2) Streams in Geologic Sequestration Activities (Proposed Rule); in 40 CFR 261.4(h); OMB filed comment on 10/25/2011.

EPA ICR Number 2439.01; NESHAP for Natural Gas Transmission and Storage; in 40 CFR part 63, subparts A and HHH; OMB filed comment on 10/25/2011.

EPA ICR Number 2440.01; NESHAP for Oil and Natural Gas Production; in 40 CFR part 63, subparts A and HH; OMB filed comment on 10/25/2011.

Dated: November 1, 2011.

John Moses,

Director, Collections Strategies Division.

[FR Doc. 2011–28764 Filed 11–4–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2007–1138; FRL–9488–2]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Reporting and Recordkeeping Requirements for Importation of Nonroad Engines and Recreational Vehicles (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before December 7, 2011.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2007–1138, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by email to *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Holly Pugliese, Compliance and Innovative Strategies Division, Office of Transportation and Air Quality, Environmental Protection Agency, 2000 Traverwood Dr., Ann Arbor, Michigan, 48105; *telephone number:* (734) 214–4288; *fax number:* (734) 214–4869; *email address: pugliese.holly@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 29, 2011 (76 *FR* 38151), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2007–1138, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the full docket ID name identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: Reporting and Recordkeeping Requirements for Importation of Nonroad Engines and Recreational Vehicles (Renewal)

ICR numbers: EPA ICR No. 1723.06, OMB Control No. 2060–0320.

ICR Status: This ICR is scheduled to expire on December 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the *Federal Register* when approved, are listed in 40 CFR part 9, are displayed either by publication in the *Federal Register* or by other appropriate means, such as on the related collection instrument or form, if

applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Individuals and businesses importing on and off-road motor vehicles, motor vehicle engines, or nonroad engines, including nonroad engines incorporated into nonroad equipment or nonroad vehicles, report and keep records of vehicle and engine importations, request prior approval for vehicle and engine importations, or request final admission for vehicles and engines conditionally imported into the U.S. The collection of this information is mandatory in order to ensure compliance of nonroad vehicles and engines with Federal emissions requirements. Joint EPA and Customs regulations at 40 CFR 85.1501 *et seq.,* 89.601 *et seq.,* 90.601 *et seq.,* 91.703 *et seq.,* 92.803 *et seq.,* 94.803 *et seq.,* 1068.301 *et seq.,* and 19 CFR 12.73 and 12.74 promulgated under the authority of Clean Air Act Sections 203 and 208 give authority for the collection of information. This authority was extended to nonroad engines and vehicles under section 213. The information is used by program personnel to help ensure that all Federal emission requirements concerning imported motor vehicles and nonroad engines are met. Any information submitted to the Agency for which a claim of confidentiality is made will be safeguarded according to policies set forth in Title 40, Chapter 1, part 2, subpart B—Confidentiality of Business Information (see 40 CFR 2.201 *et seq.*). The public is not permitted access to information containing personal or organizational identifiers.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 0.5 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Individual importers and companies who import, or import and manufacture, nonroad engines and recreational vehicles.

Estimated Number of Respondents: 4,801.

Frequency of Response: Once per entry. (One form per shipment may be used.) .

Estimated Total Annual Hour Burden: 6,029.

Estimated Total Annual Cost: $299,481. This includes an estimated burden cost of $261,479 and an estimated cost of $38,002 for capital investment or maintenance and operational costs.

Changes in the Estimates: There are no changes in the number of hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. Form 3520–21 has remained relatively unchanged since the previous renewal and therefore the burden for filling in the form remains unchanged.

Dated: November 1, 2011.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2011–28762 Filed 11–4–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[Permit No. AKG–31–5000; FRL–9486–6]

Effluent Limits Under the NPDES General Permit for Oil and Gas Exploration, Development and Production Facilities Located in State and Federal Waters in Cook Inlet, AK

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA Region 10 today issues a final action for six effluent limits for produced water under the National Pollutant Discharge Elimination System (NPDES) General Permit for Oil and Gas Exploration, Development and Production Facilities in State and Federal Waters in Cook Inlet, Permit No. AKG–31–5000 (Permit). The effluent limits subject to the final action are: mercury, copper, total aromatic hydrocarbons (TAH), total aqueous hydrocarbons (TAqH), silver, and whole effluent toxicity (WET), pursuant to the provisions of the Clean Water Act (CWA or ''the Act''), 33 U.S.C. 1251. The Permit continues to allow facilities to apply for permit coverage for exploration, development, and production facilities in Cook Inlet, Alaska that are included in the Coastal and Offshore Subcategories of the Oil and Gas Extraction Point Source Category.

State Certification: Section 401 of the Act, 33 U.S.C. 1341, requires EPA to seek a certification from the State that the conditions of the Permit are stringent enough to comply with State water quality standards. EPA obtained a final CWA Section 401 Certification from the Alaska Department of Environmental Conservation (ADEC) on o.

DATES: The final Permit action shall become effective on December 7, 2011.

Comments. On May 18, 2011, EPA re-proposed the six produced water effluent limits and ADEC's draft certification for public review in the **Federal Register**. The comment period ended on June 20, 2011. All comments received, and EPA's responses, are summarized in the Response to Comments document.

ADDRESSES: Copies of the final Permit action, Response to Comment document, and final 401 certification are available by contacting *Washington.Audrey@epa.gov*, (206) 553–0523 and posted on EPA's Web site at: *http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/Permits+Homepage.*

FOR FURTHER INFORMATION CONTACT: Hanh Shaw, Office of Water and Watersheds, U.S. Environmental Protection Agency, Region 10, 1200 6th Avenue, Suite 900, Mail Stop OWW–130, Seattle, WA 98101–3140, (206) 553–0171, *Shaw.Hanh@epa.gov.*

Appeal of Final Permit Action: Any interested person may appeal the final Permit action in the Federal Court of Appeals in accordance with Section 509(b)(1) of the Act, 33 U.S.C. 1369(b)(1). This appeal must be filed within 120 days of the final Permit action effective date.

Authority: This action is taken under the authority of Section 402 of the Clean Water Act as amended, 42 U.S.C. 1342. I hereby provide public notice of the final Permit action in accordance with 40 CFR 124.10.

Dated: October 28, 2011.

Michael A. Bussell,

Director, Office of Water and Watersheds Region 10.

[FR Doc. 2011–28785 Filed 11–4–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2010–0257; FRL–9487–9]

RIN 2040–ZA08

Final National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges From the Application of Pesticides

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final permit.

SUMMARY: This notice announces the NPDES general permit for point source discharges from the application of pesticides to waters of the United States, also referred to as the Pesticide General Permit (PGP). A draft PGP was published on June 4, 2010 for public comment. 75 FR 31775. All ten EPA Regions today are issuing the final NPDES PGP, which will be available in those areas where EPA is the NPDES permitting authority. This action is in response to the Sixth Circuit Court's ruling that vacated an EPA regulation that excluded discharges of biological pesticides and chemical pesticides that leave a residue from the application of pesticides to, or over, including near waters of the United States from the need to obtain an NPDES permit if the application was done in accordance with other laws. EPA requested and was granted a stay of the Court's mandate to provide time to draft and implement the permit noticed today. The stay of the mandate expires on October 31, 2011; after which, NPDES permits will be required for such point source discharges to waters of the United States.

DATES: This action is effective on October 31, 2011.

FOR FURTHER INFORMATION CONTACT: For further information on this final NPDES general permit, contact the appropriate EPA Regional Office listed in Section I.F, or contact Jack Faulk, EPA Headquarters, Office of Water, Office of Wastewater Management at tel.: (202) 564–0768 or email: *faulk.jack@epa.gov*.

SUPPLEMENTARY INFORMATION: This supplementary information section is organized as follows:

Table of Contents

I. General Information

A. Does this action apply to me?

You may be affected by this action if your application of pesticides, under the use patterns in Section III.B., results in a discharge to waters of the United States in one of the geographic areas identified in Section III.A. Potentially affected entities, as categorized in the North American Industry Classification System (NAICS), may include, but are not limited to:

TABLE 1—ENTITIES POTENTIALLY REGULATED BY THIS PERMIT

Category	NAICS	Examples of potentially affected entities
Agriculture parties—General agricultural interests, farmers/producers, forestry, and irrigation.	111 Crop Production.	Producers of crops mainly for food and fiber including farms, orchards, groves, greenhouses, and nurseries that have irrigation ditches requiring pest control.
	113110 Timber Tract Operations 113210 Forest Nurseries Gathering of Forest Products.	The operation of timber tracts for the purpose of selling standing timber. Growing trees for reforestation and/or gathering forest products, such as gums, barks, balsam needles, rhizomes, fibers, Spanish moss, ginseng, and truffles.
	221310 Water Supply for Irrigation	Operating irrigation systems.
Pesticide parties (includes pesticide manufacturers, other pesticide users/interests, and consultants).	325320 Pesticide and Other Agricultural Chemical Manufacturing.	Formulation and preparation of agricultural pest control chemicals.
Public health parties (includes mosquito or other vector control districts and commercial applicators that service these).	923120 Administration of Public Health Programs.	Government establishments primarily engaged in the planning, administration, and coordination of public health programs and services, including environmental health activities.
Resource management parties (includes State departments of fish and wildlife, State departments of pesticide regulation, State environmental agencies, and universities).	924110 Administration of Air and Water Resource and Solid Waste Management Programs.	Government establishments primarily engaged in the administration, regulation, and enforcement of air and water resource programs; the administration and regulation of water and air pollution control and prevention programs; the administration and regulation of flood control programs; the administration and regulation of drainage development and water resource consumption programs; and coordination of these activities at intergovernmental levels.

TABLE 1—ENTITIES POTENTIALLY REGULATED BY THIS PERMIT—Continued

Category	NAICS	Examples of potentially affected entities
	924120 Administration of Conservation Programs.	Government establishments primarily engaged in the administration, regulation, supervision and control of land use, including recreational areas; conservation and preservation of natural resources; erosion control; geological survey program administration; weather forecasting program administration; and the administration and protection of publicly and privately owned forest lands. Government establishments responsible for planning, management, regulation and conservation of game, fish, and wildlife populations, including wildlife management areas and field stations; and other administrative matters relating to the protection of fish, game, and wildlife are included in this industry.
Utility parties (includes utilities)	221 Utilities	Provide electric power, natural gas, steam supply, water supply, and sewage removal through a permanent infrastructure of lines, mains, and pipes.

B. How can I get copies of this document and other related information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. EPA–HQ–OW–2010–0257. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. Although all documents in the docket are listed in an index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. EPA policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Publicly available docket materials are available in hard copy at the EPA Docket Center Public Reading Room, open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the United States government on-line source for federal regulations at *http://www.regulations.gov.*

Electronic versions of this final permit and fact sheet are available on EPA's NPDES Web site at *http://www.epa.gov/npdes/pesticides.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.regulations.gov* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility identified in Section I.A.1.

C. Who are the EPA regional contacts for this final permit?

For EPA Region 1, contact George Papadopoulos at USEPA Region 1, 5 Post Office Square—Suite 100, Boston, MA 02109–3912; or at tel.: (617) 918–1579; or email at *papadopoulos.george@epa.gov.*

For EPA Region 2, contact Maureen Krudner at USEPA Region 2, 290 Broadway, New York, NY 10007–1866; or tel.: (212) 637–3874; or email at *krudner.maureen@epa.gov.*

For EPA Region 3, contact Peter Weber at USEPA Region 3, 1650 Arch Street, Mail Code: 3WP41, Philadelphia, PA 19103–2029; or at tel.: (215) 814–5749; or email at *weber.peter@epa.gov.*

For EPA Region 4, contact Sam Sampath at USEPA Region 4, 61 Forsyth Street SW., Atlanta, CA 30303–8960; or at tel.: (404) 562–9229; or email at *sampath.sam@epa.gov.*

For EPA Region 5, contact Morris Beaton at USEPA Region 5, 77 West Jackson Boulevard, Mail Code: WN16J, Chicago, IL 60604–3507; or at tel.: (312) 353–0850; or email at *beaton.morris@epa.gov.*

For EPA Region 6, contact Jenelle Hill at USEPA Region 6, 1445 Ross Avenue, Suite 1200, Mail Code: 6WO, Dallas, TX 75202–2733; or at tel.: (214) 665–9737 or email at *hill.jenelle@epa.gov.*

For EPA Region 7, contact Kimberly Hill at USEPA Region 7, 901 North Fifth Street, Mail Code: XX, Kansas City, KS 66101; or at tel.: (913) 551–7841 or email at: *hill.kimberly@epa.gov.*

For EPA Region 8, contact David Rise at USEPA Region 8, Montana Operations Office, Federal Building, 10 West 15th Street, Suite 3200, Mail Code: 8MO, Helena, MT 59626; or at tel.: (406) 457–5012 or email at: *rise.david@epa.gov.*

For EPA Region 9, contact Pascal Mues, USEPA Region 9, 75 Hawthorne Street, Mail Code: WTR–5, San Francisco, CA 94105; or at tel.: (415) 972–3768 or email at: *mues.pascal@epa.gov.*

For EPA Region 10, contact Dirk Helder, USEPA Region 10 Idaho Operations Office, 1435 North Orchard Street, Boise, ID 83706 or at tel.: (208) 378–5749 or email at: *helder.dirk@epa.gov.*

II. Statutory and Regulatory History

A. Clean Water Act

Section 301(a) of the Clean Water Act (CWA) provides that ''the discharge of any pollutant by any person shall be unlawful'' unless the discharge is in compliance with certain other sections of the Act. 33 U.S.C. 1311(a). The CWA defines ''discharge of a pollutant'' as ''(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.'' 33 U.S.C. 1362(12). A ''point source'' is any ''discernible, confined and discrete conveyance'' but does not include ''agricultural stormwater discharges and return flows from irrigated agriculture.'' 33 U.S.C. 1362(14).

The term ''pollutant'' includes, among other things, ''garbage* * * chemical wastes, biological materials * * * and industrial, municipal, and agricultural waste discharged into water.'' 33 U.S.C. 1362(6).

One way a person may discharge a pollutant without violating the section

301 prohibition is by obtaining authorization to discharge (referred to herein as ''coverage'') under a section 402 National Pollutant Discharge Elimination System (NPDES) permit (33 U.S.C. 1342). Under section 402(a), EPA may ''issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a)'' upon certain conditions required by the Act.

B. NPDES Permits

An NPDES permit authorizes the discharge of a specified amount of a pollutant or pollutants into a receiving water under certain conditions. The NPDES program relies on two types of permits: Individual and general. An individual permit is a permit specifically tailored for an individual discharger. Upon receiving the appropriate permit application(s), the permitting authority, *i.e.,* EPA or a state or territory, develops a draft individual permit for public comment for that particular discharger based on the information contained in the permit application (*e.g.,* type of activity, nature of discharge, receiving water quality). Following consideration of public comments, a final individual permit is then issued to the discharger for a specific time period (not to exceed 5 years) with a provision for reapplying for further permit coverage prior to the expiration date.

In contrast, a general permit covers multiple facilities/sites/activities within a specific category for a specific period of time (not to exceed 5 years). For general permits, EPA, or a state authorized to administer the NPDES program, develops and issues the general permit with dischargers then obtaining coverage under the already issued general permit, typically through submission of a Notice of Intent (NOI). A general permit is also subject to public comment, as was done for this permit on June 4, 2010, and is developed and issued by a permitting authority (in this case, EPA).

Under 40 CFR 122.28, general permits may be written to cover categories of point sources having common elements, such as facilities that involve the same or substantially similar types of operations, that discharge the same types of wastes, or that are more appropriately regulated by a general permit. Given the vast number of pesticide applicators requiring NPDES permit coverage and the discharges common to these applicators, EPA believes that it makes administrative sense to issue this general permit, rather than issuing individual permits to each applicator. Entities still have the ability to seek individual permit coverage. The general permit approach allows EPA to allocate resources in a more efficient manner and to provide more timely coverage. As with any permit, the CWA requires the general permit to contain technology-based effluent limitations, as well as any more stringent limits when necessary to meet applicable state water quality standards. Courts have approved of the use of general permits. See *e.g., Natural Res. Def. Council v. Costle,* 568 F.2d 1369 (DC Cir. 1977); *EDC* v. *U.S. EPA,* 344 F.3d 832, 853 (9th Cir. 2003).

C. History of Pesticide Application Regulation Under FIFRA

EPA regulates the sale, distribution and use of pesticides in the United States under the statutory framework of FIFRA to ensure that, when used in conformance with FIFRA labeling directions, pesticides will not pose unreasonable risks to human health and the environment. All new pesticides must undergo a rigorous registration procedure under FIFRA during which EPA assesses a variety of potential human health and environmental effects associated with use of the product. Under FIFRA, EPA is required to consider the effects of pesticides on the environment by determining, among other things, whether a pesticide ''will perform its intended function without unreasonable adverse effects on the environment,'' and whether ''when used in accordance with widespread and commonly recognized practice [the pesticide] will not generally cause unreasonable adverse effects on the environment.'' 7 U.S.C. 136a(c)(5). In performing this analysis, EPA examines, among other things, the ingredients of a pesticide, the intended type of application site and directions for use, and supporting scientific studies for human health and environmental effects and exposures. The applicant for registration of the pesticide must submit data as required by EPA regulations.

When EPA approves a pesticide for a particular use, the Agency imposes labeling restrictions governing such use. Compliance with the labeling requirements ensures that the pesticide serves an intended purpose and avoids unreasonable adverse effects. It is illegal under Section 12(a)(2)(G) of FIFRA to use a registered pesticide in a manner inconsistent with its labeling. States have primary authority under FIFRA to enforce ''use'' violations, but both the States and EPA have ample authority to prosecute pesticide misuse when it occurs.

D. Court Decisions Leading to the CWA Regulation Concerning Pesticide Applications

Over the past ten years, several courts addressed the question of whether the CWA requires NPDES permits for pesticide applications. These cases resulted in some confusion among the regulated community and other affected citizens about the applicability of the CWA to pesticides applied to waters of the United States. In 2001, the U.S. Court of Appeals for the Ninth Circuit held in *Headwaters, Inc.* v. *Talent Irrigation District* (*Talent*) that an applicator of herbicides was required to obtain an NPDES permit under the circumstances before the court. 243 F.3rd 526 (9th Cir. 2001).

In 2002, the Ninth Circuit in *League of Wilderness Defenders et al.* v. *Forsgren* (*Forsgren*) held that the application of pesticides to control Douglas Fir Tussock Moths in National Forest lands required an NPDES permit. 309 F.3d 1181 (9th Cir. 2002). The court in *Forsgren* did not analyze the question of whether the pesticides applied were pollutants, because it incorrectly assumed that the parties agreed that they were (in fact, the United States expressly reserved its arguments on that issue in its brief to the District Court. Id. at 1184, n.2). The court instead analyzed the question of whether the aerial application of the pesticide constituted a point source discharge, and concluded that it did. Id. at 1185).

Since *Talent* and *Forsgren,* California, Nevada, Oregon, and Washington, all of which are within the Ninth Circuit, have issued permits for the application of certain types of pesticides (*e.g.,* products to control aquatic weeds and algae and products to control mosquito larvae). Other States have continued their longstanding practice of not issuing permits to people who apply pesticides to waters of the United States. These varying practices reflected the substantial uncertainty among regulators, the regulated community, and the public regarding how the CWA applies to pesticides that have been properly applied and used for their intended purpose.

Additionally, the Second Circuit Court of Appeals addressed the applicability of the CWA's NPDES permit requirements to pesticide applications. In *Altman* v. *Town of Amherst* (*Altman*), the court vacated and remanded for further development of the record a District Court decision holding that the Town of Amherst was not required to obtain an NPDES permit to spray mosquitocides over waters of the United States. 47 Fed. Appx. 62, 67

(2nd Cir. 2002). The United States filed an amicus brief setting forth the Agency's views in the context of that particular case. In its opinion, the Second Circuit stated that ''[u]ntil the EPA articulates a clear interpretation of current law—among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for NPDES permits * * *—the question of whether properly used pesticides can become pollutants that violate the CWA will remain open.'' Id. at 67.

In 2005, the Ninth Circuit again addressed the CWA's applicability to pesticide applications. In *Fairhurst* v. *Hagener,* the court held that pesticides applied directly to a lake to eliminate non-native fish species, where there are no residues or unintended effects, are not ''pollutants'' under the CWA because they are not chemical wastes. 422 F.3d 1146 (9th Cir. 2005).

Recently, the Second Circuit reaffirmed the recent Sixth Circuit decision in ruling that trucks and helicopters that sprayed pesticides should be considered point sources under the CWA. *Peconic Baykeeper Inc.* v. *Suffolk County,* 600 F.3d 180 (2nd Cir. 2010).

E. 2006 Agency Rulemaking Excluding Discharges From Pesticide Applications from NPDES Permitting

On November 27, 2006 (71 FR 68483), EPA issued a final rule (hereinafter called the ''2006 NPDES Pesticides Rule'') clarifying two specific circumstances in which an NPDES permit is not required to apply pesticides to or over, including near water provided that the application is consistent with relevant Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) requirements. They are: (1) The application of pesticides directly to water to control pests; and (2) the application of pesticides to control pests that are present over, including near, water where a portion of the pesticides will unavoidably be deposited to the water to target the pests.

F. Legal Challenges to the 2006 NPDES Pesticide Rule and Resulting Court Decision

On January 19, 2007, EPA received petitions for review of the 2006 NPDES Pesticides Rule from both environmental and industry groups. Petitions were filed in eleven circuit courts with the case, *National Cotton Council, et al,* v. *EPA,* assigned to the Sixth Circuit Court of Appeals. On January 9, 2009, the Sixth Circuit vacated EPA's 2006 NPDES Pesticides Rule under a plain language reading of the CWA. *National Cotton Council of America* v. *EPA,* 553 F.3d 927 (6th Cir. 2009). The Court held that the CWA unambiguously includes ''biological pesticides,'' and ''chemical pesticides'' that leave a residue within its definition of ''pollutant.'' Specifically, the application of chemical pesticides that leaves no residue is not a pollutant. The Court also found that the application of pesticides is from a point source. Thus, point source discharges of biological pesticides and chemical pesticide residues to Waters of the United States require an NPDES permit. This also means (as also supported by other court cases) that point source discharges to waters of the United States from pesticides applied for forest pest control activities need to obtain an NPDES permit (see Section III.1 of the Fact Sheet for further discussion).

Based on the Court's decision, chemical pesticides that leave no residue do not require an NPDES permit. However, EPA assumes for purpose of this permit that all chemical pesticides have a residue, and, therefore would need a permit unless it can be shown that there is no residual. Unlike chemical pesticides (where the residual is the pollutant), the Court further found that biological pesticides are pollutants regardless of whether the application results in residuals and such discharges need an NPDES permit.

In response to this decision, on April 9, 2009, EPA requested a two-year stay of the mandate to provide the Agency time to develop a general permit, to assist NPDES-authorized states to develop their NPDES permits, and to provide outreach and education to the regulated community and other stakeholders. On June 8, 2009, the Sixth Circuit granted EPA the two-year stay of the mandate until April 9, 2011. On November 2, 2009, Industry Petitioners of the Sixth Circuit Case petitioned the Supreme Court to review the Sixth Circuit's decision. On February 22, 2010, the Supreme Court issued its decision denying petitions to review the Sixth Circuit decision.

As a result of the Court's decision on the 2006 NPDES Pesticides Rule, at the end of the two-year stay, NPDES permits will be required for point source discharges to waters of the U.S. of biological pesticides, and of chemical pesticides that leave a residue. Until April 9, 2011, the rule remains in effect and NPDES permits are not required.

In response to the Court's decision, EPA is issuing this final general permit for four specific pesticide use patterns with an effective date of April 9, 2011, *i.e.,* the date upon which NPDES permits are required for discharges from the application of pesticides. The specified use patterns may not represent every pesticide application activity for which a discharge requires NPDES permit coverage; however, the Agency believes these four use patterns represent a significant portion of those activities for which permit coverage is now required and is consistent with the use patterns EPA contemplated in the 2006 NPDES Pesticides Rule.

Neither the Court's ruling nor EPA's issuance of this general permit affects the existing CWA exemptions for irrigation return flow and agricultural stormwater runoff, which are excluded from the definition of a point source under Section 502(14) of the CWA and do not require NPDES permit coverage.

G. Publication of the Draft NPDES Pesticide General Permit

EPA worked closely with states and other stakeholders to develop the PGP. Because 44 states are required to develop their own permits, EPA held three face-to-face meetings and regular conference calls with environmental and agricultural agencies in each state, in order to share information and ideas on how to permit this new class of NPDES permittees. EPA also conducted or attended approximately 150 meetings with industry experts, environmental interest groups, and other interested stakeholders.

EPA published the draft NPDES Pesticide General Permit and accompanying fact sheet in the **Federal Register** on June 4, 2010 (75 FR 31775) soliciting comments on that permit, and accepted public comments through July 19, 2010. In addition, EPA held three public meetings, a public hearing, and three national webcasts to further educate stakeholders on the conditions included in the draft permit and to get feedback on specific areas for which EPA sought additional information to support finalization of the permit. EPA also conducted formal consultation with the Tribes. EPA received over 750 written comment letters on the draft permit from a variety of stakeholders, including industry; federal, state, and local governments; environmental groups; academia; and individual citizens. EPA considered all comments received during the comment period in preparing the final general permit. EPA responded to all significant comments in the Response to Comment Document which is available as part of the docket to this permit.

H. Posting of the Draft Final NPDES Pesticide General Permit

On April 1, 2011, EPA posted a pre-publication version of its draft final Pesticide General Permit for discharges of pesticide applications to U.S. waters. This draft final permit was not considered a ''final agency action,'' and the Agency did not solicit public comment on this draft final permit. EPA provided a preview of the draft final permit to assist states in developing their own permits and for the regulated community to become familiar with the permit's requirements before it was to become effective. This reflected EPA's commitment to transparency and responding to the needs of stakeholders. The draft final permit posted on April 1, 2011 contains largely identical requirements to the final permit being published today. The principal change is the addition of conditions to protect listed species as a result of consultation with the National Marine Fisheries Service (NMFS) under the Endangered Species Act (ESA). There have also been changes to the timing of NOI submission deadlines and some additional clarifying changes, but these do not alter the intent of the pre-publication version posted in April.

III. Scope and Applicability of the NPDES Pesticide General Permit

A. Geographic Coverage

The PGP will provide permit coverage for discharges in areas where EPA is the NPDES permitting authority. The geographic coverage of today's final permit is listed below. Where this permit covers activities on Indian Country lands, those areas are as listed below within the borders of that state:

EPA Region 1

- Massachusetts, including Indian Country lands within Massachusetts
- Indian Country lands within Connecticut
- New Hampshire
- Indian Country lands within Rhode Island
- Federal Facilities within Vermont

EPA Region 2

- Indian Country lands within New York
- Puerto Rico

EPA Region 3

- The District of Columbia
- Federal Facilities within Delaware

EPA Region 4

- Indian Country lands within Alabama
- Indian Country lands within Florida
- Indian Country lands within Mississippi
- Indian Country lands within North Carolina

EPA Region 5

- Indian Country lands within Michigan
- Indian Country lands within Minnesota, excluding Sokaogon Chippewa Community
- Indian Country lands within Wisconsin, excluding Lac du Flambeau Band of Lake Superior Chippewa Indians and Fond du Lac Reservation

EPA Region 6

- Indian Country lands within Louisiana
- New Mexico, including Indian Country lands within New Mexico, except Navajo Reservation Lands (see Region 9) and Ute Mountain Reservation Lands (see Region 8)
- Oklahoma, including Indian Country lands
- Discharges in Texas that are not under the authority of the Texas Commission on Environmental Quality (formerly TNRCC), including activities associated with the exploration, development, or production of oil or gas or geothermal resources, including transportation of crude oil or natural gas by pipeline, including Indian Country lands within Texas

EPA Region 7

- Indian Country lands within Iowa
- Indian Country lands within Kansas
- Indian Country lands within Nebraska, except Pine Ridge Reservation lands (see Region 8)

EPA Region 8

- Federal Facilities within Colorado, including those on Indian Country lands within Colorado as well as the portion of the Ute Mountain Reservation located in New Mexico
- Indian Country lands within the State of Colorado, as well as the portion of the Ute Mountain Reservation located in New Mexico
- Indian Country lands within Montana
- Indian Country lands within North Dakota
- Indian Country lands within South Dakota, as well as the portion of the Pine Ridge Reservation located within Nebraska (see Region 7)
- Indian Country lands within Utah, except Goshute and Navajo Reservation lands (see Region 9)
- Indian Country lands within Wyoming

EPA Region 9

- American Samoa
- Indian Country lands within Arizona as well as Navajo Reservation lands within New Mexico (see Region 6) and Utah (see Region 8), excluding for Hualapai Reservation
- Indian Country lands within California
- Guam
- Johnston Atoll
- Midway Island and Wake Island and other unincorporated U.S. possessions
- Northern Mariana Islands
- Indian Country lands within Nevada, as well as the Duck Valley Reservation within Idaho, the Fort McDermitt Reservation within Oregon (see Region 10) and the Goshute Reservation within Utah (see Region 8)

EPA Region 10

- Alaska, including Indian Country lands
- The State of Idaho, including Indian Country lands within Idaho, except Duck Valley Reservation lands (see Region 9), excluding Puyallup Tribe Reservation
- Indian Country lands within Oregon, except Fort McDermitt Reservation lands (see Region 9)
- Federal Facilities in Washington, including those located on Indian Country lands within Washington, excluding Puyallup Tribe Reservation

B. Categories of Facilities Covered

The final general permit regulates discharges to waters of the United States from the application of (1) biological pesticides, and (2) chemical pesticides that leave a residue for the following four pesticide use patterns.

- *Mosquito and Other Flying Insect Pest Control*—to control public health/nuisance and other flying insect pests that develop or are present during a portion of their life cycle in or above standing or flowing water. Public health/nuisance and other flying insect pests in this use category include mosquitoes and black flies.
- *Weed and Algae Pest Control*—to control weeds, algae, and pathogens that are pests in water and at water's edge, including ditches and/or canals.
- *Animal Pest Control*—to control animal pests in water and at water's edge. Animal pests in this use category include fish, lampreys, insects, mollusks, and pathogens.
- *Forest Canopy Pest Control*—application of a pesticide to a forest canopy to control the population of a pest species (*e.g.,* insect or pathogen) where, to target the pests effectively, a portion of the pesticide unavoidably will be applied over and deposited to water.

The scope of activities encompassed by these pesticide use patterns is described in greater detail in Part III.1.1. of the fact sheet for the final general permit.

C. Summary of Permit Terms and Requirements

The following is a summary of the final PGP's requirements:

- The PGP defines Operator (*i.e.,* the entity required to obtain NPDES permit coverage for discharges) to include any (a) *Applicator* who performs the application of pesticides or has day-to-day control of the application of pesticides that results in a discharge to Waters of the United States, or (b) *Decision-maker* who controls any decision to apply pesticides that results in a discharge to Waters of the United States. There may be instances when a single entity acts as both an Applicator and a Decision-maker.
- All Applicators are required to minimize pesticide discharges by using only the amount of pesticide and frequency of pesticide application necessary to control the target pest, maintain pesticide application equipment in proper operating condition, control discharges as necessary to meet applicable water quality standards, and monitor for and report any adverse incidents.
- All Decision-makers are required, to the extent not determined by the Applicator, to minimize pesticide discharges by using only the amount of pesticide and frequency of pesticide application necessary to control the target pest. All Decision-makers are also required to control discharges as necessary to meet applicable water quality standards and monitor for and report any adverse incidents.
- Coverage under this permit is available only for discharges and discharge-related activities that are not likely to adversely affect species that are federally-listed as endangered or threatened (''listed'') under the Endangered Species Act (ESA) or habitat that is federally-designated as critical under the ESA (''critical habitat''), except for certain cases specified in the permit involving prior consultation with the Services and Declared Pest Emergencies. The permit contains several provisions addressing listed species, including for certain listed species identified in the permit as NMFS Listed Resources of Concern, that Decision-makers whose discharges may affect these resources certify compliance with one of six criteria which together ensure that any potential adverse effects have been properly considered and addressed. These NMFS Listed Resources of Concern for the PGP are identified in detail on EPA's Web site at *http://www.epa.gov/npdes/pesticides.* These provisions were added as a result of consultation between EPA and the National Marine Fisheries Service (NMFS), as required under Section 7 of the Endangered Species Act. Other requirements that address protection of listed species include the waiting periods between submission of an NOI and authorization to discharge, and specific permit conditions requiring compliance with the results of any ESA Section 7 consultation with the Services, or ESA Section 10 permit issued by the Services.
- Certain Decision-makers (*i.e.,* any agency for which pest management for land resource stewardship is an integral part of the organization's operations, entities with a specific responsibility to control pests (*e.g.,* mosquito and weed control districts), local governments or other entities that apply pesticides in excess of specified annual treatment area thresholds, and entities that discharge pesticides to Tier 3 waters or to Waters of the United States containing NMFS Listed Resources of Concern) are required to also submit a Notice of Intent (NOI) to obtain authorization to discharge and implement pest management options to reduce the discharge of pesticides to Waters of the United States. Certain large Decision-makers must also develop a Pesticide Discharge Management Plan (PDMP), submit annual reports, and maintain detailed records. Certain small Decision-makers are required to complete a pesticide discharge evaluation worksheet for each pesticide application (in lieu of the more comprehensive PDMP), an annual report, and detailed recordkeeping.

Permit conditions take effect as of October 31, 2011; however, Operators with eligible discharges are authorized for permit coverage through January 12, 2010 without submission of an NOI. Thus, for any discharges commencing on or before January 12, 2012 that will continue after this date, an NOI will need to be submitted no later than January 2, 2012 to ensure uninterrupted permit coverage, and for any discharge occurring after January 12, 2012, no later than 10 days before the first discharge occurring after January 12, 2012.

The following is a summary of permit terms and requirements modified from the draft PGP public noticed on June 4, 2010:

- Expanded the forest canopy pest control use pattern to also include pesticide application activities performed from the ground;
- Expanded eligibility provisions to provide for coverage for discharges to Tier 3 waters from pesticide applications made to restore or maintain water quality or to protect public health or the environment that either do not degrade water quality or that only degrade water quality on a short-term or temporary basis;
- Eliminated the requirement for certain Applicators to submit NOIs;
- Revised annual treatment area thresholds (which trigger the need for NOI submission and implementation of more comprehensive Pest Management Measures and documentation);
- Delayed discharge date for which NOIs are required for a little more than two months after permit issuance;
- Refined definitions of ''Operator,'' ''Applicator,'' and ''Decision-maker,'' for purposes of delineating responsibilities under the permit between Applicators and Decision-makers based on EPA's expectation for these two groups of Operators;
- Added requirement for Applicators to assess weather conditions in the treatment area to ensure pesticide application is consistent with all federal requirements;
- Added requirement for certain Operators to document visual monitoring activities, Provided different responsibilities for small Decision-makers to complete a pesticide discharge evaluation worksheet in lieu of a more comprehensive PDMP, annual report, and detailed recordkeeping; and
- Added specific permit conditions for states and Tribes in accordance with CWA section 401 certifications.

IV. Economic Impacts of the Pesticide General Permit

As a result of the Sixth Circuit Court decision on EPA's 2006 NPDES Pesticides Rule, operators of discharges to waters of the U.S. from the application of pesticides now require NPDES permits for those discharges. EPA expects that costs associated with complying with the effluent limitations under this general permit will be similar to costs under individual permits for similar activities; however, administrative costs for both EPA as the permitting authority and operators as permittees are expected to be lower under this general permit than under individual permits. In other words, the general permit itself can be expected to reduce rather than increase costs for permittees as compared to the baseline of individual permitting.

EPA expects the economic impact on covered entities, including small businesses, to be minimal. EPA requested additional information during

the public notice of the draft permit and updated the analysis as appropriate for the final permit. A copy of EPA's economic analysis, titled, ''Economic Analysis of the Pesticide General Permit (PGP) for Point Source Discharges from the Application of Pesticides'' is available in the docket for this permit. The economic impact analysis indicates that the PGP will cost approximately $10.0 million dollars annually for the 35,200 operators in the areas for which EPA is the permitting authority. Knowing that most applicators and decision-makers are small businesses, EPA conducted a small entity economic analysis. Based on available data, this permit will not have a significant economic impact on a substantial number of small entities. The economic impact analysis is included in the administrative record for this permit.

V. Executive Orders 12866 and 13563

Under Executive Order (EO) 12866 (*58 FR 51735* (October 4, 1993)) this action is a ''significant regulatory action.'' Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: October 31, 2011.
H. Curtis Spalding,
Regional Administrator, EPA, Region 1.

Dated: October 31, 2011.
Ariel Iglesias,
Deputy Director, Division of Environmental Planning and Protection, EPA Region 2.

Dated: October 31, 2011.
Carl-Axel P. Soderberg,
Division Director, Caribbean Environmental Protection Division, EPA, Region 2.

Dated: October 31, 2011.
Jon M. Capacasa,
Director, Water Division, EPA Region 3.

Dated: October 31, 2011.
Gail Mitchell,
Acting Director, Water Protection Division, EPA, Region 4.

Dated: October 31, 2011.
Tinka G. Hyde,
Director, Water Division, EPA Region 5.

Dated: October 31, 2011.
William K. Honker,
Acting Director, Water Quality Protection Division, EPA Region 6.

Dated: October 31, 2011.
Karen A. Flournoy,
Acting Director, Water, Wetlands, and Pesticides Division, EPA Region 7.

Dated: October 31, 2011.
Stephen S. Tuber,
Assistant Regional Administrator, Office of Partnerships and Regulatory Assistance, EPA Region 8.

Dated: October 31, 2011.
Alexis Strauss,
Director, Water Division, EPA Region 9.

Dated: October 31, 2011.
Michael A. Bussell,
Director, Office of Water and Watersheds, EPA Region 10.

[FR Doc. 2011–28770 Filed 11–4–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collections Approved by the Office of Management and Budget (OMB)

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Federal Communications Commission has received Office of Management and Budget (OMB) approval for the following public information collection(s) pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number, and no person is required to respond to a collection of information unless it displays a currently valid OMB control number.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection contact Leslie Haney, *Leslie.Haney@fcc.gov,* (202) 418–1002.

SUPPLEMENTARY INFORMATION: The FCC obtained approval of this revision to the previously approved information collection to establish a voluntary electronic method of complying with the reporting that EAS participants must complete as part of their participation in the national EAS test.

OMB Control Number: 3060–0207.
OMB Approval Date: 10/14/2011.
Effective Date: 10/17/2011.
OMB Expiration Date: 04/30/2012.
Title: Part 11—Emergency Alert System (EAS).
Form No.: Not applicable.
Estimated Annual Burden: 82,008 hours.
Obligation to Respond: Voluntary. Statutory authority for this collection of information is contained in 47 U.S.C. sections 154(i) and 606.
Nature and Extent of Confidentiality: The Commission will treat submissions pursuant to 47 CFR 11.61(a)(3) as confidential.

Needs and Uses: On March 10, 2010, OMB authorized the collection of information set forth in the Second FNPRM in EB Docket No. 04–296, FCC 09–10. Specifically, OMB authorized the Commission to require entities required to participate in EAS (EAS Participants) to gather and submit the following *52663 information on the operation of their EAS equipment during a national test of the EAS: (1) Whether they received the alert message during the designated test; (2) whether they retransmitted the alert; and (3) if they were not able to receive and/or transmit the alert, their 'best effort' diagnostic analysis regarding the cause or causes for such failure. OMB also authorized the Commission to require EAS Participants to provide it with the date/time of receipt of the EAN message by all stations; and the date/time of receipt of the EAT message by all stations; a description of their station identification and level of designation (PEP, LP–1, etc.); who they were monitoring at the time of the test, and the make and model number of the EAS equipment that they utilized.

In the Third Report and Order in EB Docket No. 04–296, FCC 09–10, the Commission adopted the foregoing rule requirements. In addition, the Commission decided that test data will be presumed confidential and disclosure of test data will be limited to FEMA, NWS and EOP at the Federal level. At the State level, test data will be made available only to State government emergency management agencies that have confidential treatment protections at least equal to FOIA. The process by which these agencies would receive test data will comport with those used to provide access to the Commission's NORS and DIRS data. We seek comment on this revision of the approved collection.

In the Third Report and Order, the Commission also indicated that it would establish a voluntary electronic reporting system that EAS test participants may use as part of their participation in the national EAS test. The Commission noted that using this system, EAS test participants could input the same information that they were already required to file manually via a web-based interface into a confidential database that the Commission would use to monitor and assess the test. This information would include identifying information such as station call letters, license identification number, geographic coordinates, EAS assignment (LP, NP, etc), EAS monitoring assignment, as well as a 24/7 emergency contact for the EAS Participant. The only difference, other

than the electronic nature of the filing, would the timing of the collection. On the day of the test, EAS Test participants would be able to input immediate test results, (*e.g.,* was the EAN received and did it pass) into a web-based interface. Test participants would submit the identifying data prior to the test date, and the remaining data called for by our reporting rules (*e.g.* the detailed test results) within the 45 day period. The Commission believes that structuring an electronic reporting system in this fashion would allow the participants to populate the database with known information well prior to the test, and thus be able to provide the Commission with actual test data, both close to real-time and within a reasonable period in a minimally burdensome fashion.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2011–28681 Filed 11–4–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before January 6, 2012. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to the Federal Communications Commission via email to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0573.

Title: Application for Franchise Authority Consent to Assignment or Transfer of Control of Cable Television Franchise, FCC Form 394.

Form Number: FCC Form 394.

Type of Review: Extension of a currently approved collection.

Respondents: Business of other for-profit entities; State, Local or Tribal Government.

Number of Respondents and Responses: 2,000 respondents; 1,000 responses.

Estimated Time per Response: 1–5 hours.

Frequency of Response: Third Party Disclosure Requirements.

Total Annual Burden: 7,000 hours.

Total Annual Costs: $750,000.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: FCC Form 394 is a standardized form that is completed by cable operators in connection with the assignment and transfer of control of cable television systems. On July 23, 1993, the Commission released a Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92–264, FCC 93–332, Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions. Among other things, this Report and Order established procedures for use of the FCC Form 394.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2011–28744 Filed 11–4–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Approved by the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number, and no person is required to respond to a collection of information unless it displays a currently valid control number. Comments concerning the accuracy of the burden estimates and any suggestions for reducing the burden should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

FOR FURTHER INFORMATION CONTACT: Gregory Hlibok, Disability Rights Office, Consumer and Governmental Affairs Bureau, at (202) 559–5158 (voice and videophone), or email: *Gregory.Hlibok@fcc.gov<mailto:Gregory.Hlibok@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–1150.

OMB Approval Date: 10/20/2011.

Expiration Date: 10/31/2014.

Title: Structure and Practices of the Video Relay Service Program, Second Report and Order, CG Docket No. 10–51.

Form No.: N/A.

Estimated Annual Burden: 11 respondents; 54 responses; .5 hours to 50 hours per response; 900 burden hours per year; $0 annual cost burden.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is found at sections 225. The law was enacted on July 26, 1990, as Title IV of the Americans with Disabilities Act, Public Law 101–336, 104 Stat. 327, 366–60.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information (PII) from individuals.

Needs and Uses: On July 28, 2011, in document FCC 11–118, the Commission released a Second Report and Order, published at 76 FR 47469, August 5, 2011, adopting the final rules that amend the Commission's process for certifying Internet-based Telecommunications Relay Service (iTRS) providers as eligible for payment from the Interstate TRS Fund (Fund) for their provision of iTRS, as proposed in the Commission's April 2011 Further Notice of Proposed Rulemaking in the Video Relay Service (VRS) reform proceeding, CG Docket No. 10–51, published at 76 FR 24437, May 2, 2011. The Commission adopted the newly revised certification process to ensure that iTRS providers receiving certification are qualified to provide iTRS in compliance with the Commission's rules, and to eliminate waste, fraud and abuse through improved oversight of such providers.

The Second Report and Order contains information collection requirements with respect to the following four requirements, all of which aims to ensure that providers are qualified to receive compensation from the Fund for the provision of iTRS and that the services are provided in compliance with the Commission's rules with no or minimal service interruption.

(A) Required Evidence for Submission for Eligibility Certification. The Second Report and Order requires that potential iTRS providers must provide full and detailed information in its application for certification that show its ability to comply with the Commission's rules. The Second Report and Order requires that applicants must provide a detailed description of how the applicant will meet all non-waived mandatory minimum standards applicable to each form of TRS offered, including documentary and other evidence, and in the case of VRS, such documentary and other evidence shall demonstrate that the applicant leases, licenses or has acquired its own facilities and operates such facilities associated with TRS call centers and employs their own communications assistants (CAs), on a full or part-time basis, to staff such call centers at the date of the application. Such evidence shall include but not be limited to:

1. For VRS applicants operating five or fewer call centers within the United States, a copy of each deed or lease for each call center operated by the applicant within the United States;

2. For VRS applicants operating more than five call centers within the United States, a copy of each deed or lease for a representative sampling (taking into account size (by number of CAs) and location) of five call centers operated by the applicant within the United States; and

3. For VRS applicants operating call centers outside of the United States, a copy of each deed or lease for each call center operated by the applicant outside of the United States;

4. For all applicants, a list of individuals or entities that hold at least a 10 percent equity interest in the applicant, have the power to vote 10 percent or more of the securities of the applicant, or exercise de jure or de facto control over the applicant, a description of the applicant's organizational structure, and the names of its executives, officers, members of its board of directors, general partners (in the case of a partnership), and managing members (in the case of a limited liability company);

5. For all applicants, a list of the number of applicant's full-time and part-time employees involved in TRS operations, including and divided by the following positions: executives and officers; video phone installers (in the case of VRS), CAs, and persons involved in marketing and sponsorship activities;

6. Where applicable, a description of the call center infrastructure, and for all core call center functions (automatic call distribution, routing, call setup, mapping, call features, billing for compensation from the Fund, and registration) a statement whether such equipment is owned, leased or licensed (and from whom if leased or licensed) and proofs of purchase, leases or license agreements, including a complete copy of any lease or license agreement for automatic call distribution;

7. For all applicants, copies of employment agreements for all of the provider's executives and CAs need not be submitted with the application, but must be retained by the applicant and submitted to the Commission upon request; and

8. For all applicants, a list of all sponsorship arrangements relating to Internet-based TRS, including any associated written agreements;

(B) Submission of Annual Report. The Second Report and Order requires that providers submit annual reports that include updates to the information listed under Section A above or certify that there are no changes to the information listed under Section A above.

(C) Requiring Providers to Seek Prior Authorization of Voluntary Interruption of Service. The Second Report and Order requires that a VRS provider seeking to voluntarily interrupt service for a period of 30 minutes or more in duration must first obtain Commission authorization by submitting a written request to the Commission's Consumer and Governmental Affairs Bureau (CGB) at least 60 days prior to any planned service interruption, with detailed information of:

(1) Its justification for such interruption;

(2) Its plan to notify customers about the impending interruption; and

(3) Its plans for resuming service, so as to minimize the impact of such disruption on consumers through a smooth transition of temporary service to another provider, and restoration of its service at the completion of such interruption.

(D) Reporting of Unforeseen Service Interruptions. With respect to brief, unforeseen service interruptions or in the event of a VRS provider's voluntary service interruption of less than 30 minutes in duration, the Second Report and Order requires that the affected provider submit a written notification to CGB within two business days of the commencement of the service interruption, with an explanation of when and how the provider has restored service or the provider's plan to do so imminently. In the event the provider has not restored service at the time such report is filed, the provider must submit a second report within two business days of the restoration of service with an explanation of when and how the provider has restored service.

On October 17, 2011, in document FCC 11–155, the Commission released a Memorandum Opinion and Order (MO&O), published at 76 FR 67070, October 31, 2011, addressing the petition for reconsideration filed by Sorenson Communications, Inc. (Sorenson). Sorenson concurrently filed a PRA comment challenging two aspects of the information collection requirements as being too burdensome. In response, the Commission modified the information collection requirements contained in the July 28, 2011 Second Report and Order. Specifically, in the MO&O, the Commission revised the language in the rules to require that providers that operate five or more domestic call centers only submit copies of proofs of purchase, leases or license agreements for technology and equipment used to support their call center functions for five of their call centers that constitute a representative sample of their centers, rather than requiring copies for all call centers. Further, the Commission clarified that the rule requiring submission of a list of all sponsorship arrangements relating to iTRS only requires that a certification applicant include on the list associated

written agreements, and does not require the applicant to provide copies of all written agreements.

Therefore, the information collection requirement for A. Required Evidence for Submission for Eligibility Certification, paragraphs (6) and (8) listed above is revised to read as follows:

6. A description of the technology and equipment used to support their call center functions—including, but not limited to, automatic call distribution, routing, call setup, mapping, call features, billing for compensation from the TRS Fund, and registration—and for each core function of each call center for which the applicant must provide a copy of technology and equipment proofs of purchase, leases or license agreements in accordance with paragraphs (a)–(d) listed below, a statement whether such technology and equipment is owned, leased or licensed (and from whom if leased or licensed);

(a) For VRS providers operating five or fewer call centers within the United States, a copy of each proof of purchase, lease or license agreement for all technology and equipment used to support their call center functions, for each call center operated by the applicant within the United States;

(b) For VRS providers operating more than five call centers within the United States, a copy of each proof of purchase, lease or license agreement for technology and equipment used to support their call center functions for a representative sampling (taking into account size (by number of communications assistants) and location) of five call centers operated by the applicant within the United States; a copy of each proof of purchase, lease or license agreement for technology and equipment used to support their call center functions for all call centers operated by the applicant within the United States must be retained by the applicant for three years from the date of the application, and submitted to the Commission upon request;

(c) For VRS providers operating call centers outside of the United States, a copy of each proof of purchase, lease or license agreement for all technology and equipment used to support their call center functions for each call center operated by the applicant outside of the United States; and

(d) A complete copy of each lease or license agreement for automatic call distribution.

8. For all applicants, a list of all sponsorship arrangements relating to Internet-based TRS, including on that list a description of any associated written agreements; copies of all such arrangements and agreements must be retained by the applicant for three years from the date of the application, and submitted to the Commission upon request.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2011–28746 Filed 11–4–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before January 6, 2012. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to the Federal Communications Commission via email to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0607.

Title: Section 76.922, Rates for Basic Service Tiers and Cable Programming Services Tiers.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit and State, Local or Tribal Government.

Number of Respondents and Responses: 25 respondents; 25 respondents.

Estimated Time per Response: 12 hours.

Total Annual Burden: 300 hours.

Total Annual Costs: None.

Obligation To Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 4(i) and 623 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need to confidentiality with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: 47 CFR 76.922(b)(5)(C) provides that an eligible small system that elects to use the streamlined rate reduction process must implement the required rate reductions and provide written notice of such reductions to local subscribers, the local franchising authority (''LFA''), and the Commission.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2011–28745 Filed 11–4–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92–237; DA 11–1729]

GSA Approves Renewal of North American Numbering Council Charter Through September 23, 2013

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: On October 18, 2011, the Commission released a public notice announcing GSA's approval of the renewal of the North American Numbering Council charter through September 23, 2013. The intended effect of this action is to make the public aware of the renewal of the North American Numbering Council charter.

DATES: Renewed through September 23, 2013.

ADDRESSES: Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, The Portals II, 445 12th Street SW., Suite 5–C162, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Deborah Blue, Special Assistant to the Designated Federal Officer (DFO) at (202) 418–1466 or *Deborah.Blue@fcc.gov.* The fax number is: (202) 418–1413. The TTY number is: (202) 418–0484.

SUPPLEMENTARY INFORMATION: The General Services Administration (GSA) has renewed the charter of the North American Numbering Council (NANC or Council) through September 23, 2013. The Council will continue to advise the Federal Communications Commission (Commission) on rapidly evolving and competitively significant numbering issues facing the telecommunications industry.

In October 1995, the Commission established the NANC, a Federal advisory committee created pursuant to the Federal Advisory Committee Act, 5 U.S.C., App. 2 (1988), to advise the Commission on issues related to North American Numbering Plan (NANP) administration. The Commission filed the original charter of the Council on October 5, 1995, establishing an initial two-year term. The Wireline Competition Bureau (Bureau) has renewed this charter every two years since that date. Since the last charter renewal, the Council has provided the Commission with critically important recommendations, such as the NANC's proposed method of selecting a Local Number Portability Administrator. In addition, the Council recommended porting intervals for simple, non-simple, and project ports, along with provisioning flows to support those recommended porting intervals. The Council also provided detailed annual evaluations of the current North American Numbering Plan Administrator (NANPA), the Pooling Administrator (PA), and the Billing and Collection (B and C) Agent. The Council will continue to evaluate the performances of the NANPA, the PA, and the B and C Agent on an annual basis. Moreover, the Council is presently considering and formulating recommendations on other important numbering-related issues that will require work beyond the term of the present charter.

The value of this Federal advisory committee to the telecommunications industry and to the American public cannot be overstated. Telephone numbers are the means by which consumers gain access to, and reap the benefits of, the public switched telephone network. The Council's recommendations to the Commission will facilitate fair and efficient number administration in the United States, and will ensure that numbering resources are available to all telecommunications service providers on a fair and equitable basis, consistent with the requirements of the Telecommunications Act of 1996.

Federal Communications Commission.

Marilyn Jones,

Attorney, Wireline Competition Bureau.

[FR Doc. 2011–28698 Filed 11–4–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 11–1733]

Notice of Suspension and Commencement of Proposed Debarment Proceedings; Schools and Libraries Universal Service Support Mechanism

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Enforcement Bureau (the ''Bureau'') gives notice of Mr. Jeremy R. Sheets's suspension from the schools and libraries universal service support mechanism (or ''E-Rate Program''). Additionally, the Bureau gives notice that debarment proceedings are commencing against him. Mr. Sheets, or any person who has an existing contract with or intends to contract with him to provide or receive services in matters arising out of activities associated with or related to the schools and libraries support mechanism, may respond by filing an opposition, supported by documentation to Joy Ragsdale, Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, Room 4–A236, 445 12th Street SW., Washington, DC 20554.

DATES: Oppositions and any relevant documentation must be received by December 7, 2011. Any opposition, however, must be received 30 days from the receipt of the suspension letter or November 17, 2011, whichever comes first. The Bureau will decide any opposition for reversal or modification of suspension or debarment within 90 days of its receipt of any information.

ADDRESSES: Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, Room 4–A236, 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Joy Ragsdale, Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, Room 4–A236, 445 12th Street SW., Washington, DC 20554. Joy Ragsdale may be contacted by phone at (202) 418–1697 or email at *Joy.Ragsdale@fcc.gov.* If Ms. Ragsdale is unavailable, you may contact Ms. Terry Cavanaugh, Acting Chief, Investigations and Hearings Division, by telephone at (202) 418–1420 and by email at *Terry.Cavanaugh@fcc.gov.*

SUPPLEMENTARY INFORMATION: The Bureau has suspension and debarment authority pursuant to 47 CFR 54.8 and 47 CFR 0.111(a)(14). Suspension will help to ensure that the party to be suspended cannot continue to benefit from the schools and libraries mechanism pending resolution of the debarment process. Attached is the suspension letter, DA 11–1733, which was mailed to Mr. Sheets and released on October 18, 2011. The complete text of the notice of suspension and initiation of debarment proceedings is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portal II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. In addition, the complete text is available on the FCC's Web site at *http://www.fcc.gov.* The text may also be purchased from the Commission's duplicating inspection and copying during regular business hours at the contractor, Best Copy and Printing, Inc., Portal II, 445 12th Street SW., Room CY–B420, Washington, DC 20554, telephone (202) 488–5300 or (800) 378–3160, facsimile (202) 488–5563, or via email *http://www.bcpiweb.com.*

Federal Communications Commission.

Theresa Z. Cavanaugh,

Acting Chief, Investigations and Hearings Division, Enforcement Bureau.

The suspension letter follows:

October 18, 2011

DA 11–1733

SENT VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED AND EMAIL

Mr. Jeremy R. Sheets
c/o Mr. Martin E. Crandall
Clark Hill PLC
500 Woodward Ave., Suite 3500

Detroit, MI 48226–3435

Re: Notice of Suspension and Initiation of Debarment Proceedings, File No. EB–11–IH–1122

Dear Mr. Sheets:

The Federal Communications Commission (''Commission'') has received notice of your conviction of wire fraud in violation of 18 U.S.C. 1343 in connection with your participation in the federal schools and libraries universal service support mechanism (''E-Rate program'').[1] Consequently, pursuant to 47 CFR 54.8, this letter constitutes official notice of your suspension from the E-Rate program. In addition, the Enforcement Bureau (''Bureau'') hereby notifies you that the Bureau will commence debarment proceedings against you.[2]

I. Notice of Suspension

The Commission established procedures to prevent persons who have ''defrauded the government or engaged in similar acts through activities associated with or related to the schools and libraries support mechanism'' from receiving the benefits associated with that program.[3] The E-Rate program rules require school applicants to pay a percentage of the total cost of eligible goods and services requested for funding.[4] To ensure a fair and competitive bidding process, the E-Rate program rules also prohibit a service provider from soliciting or offering gifts or donations to a school applicant, and likewise prohibit a school applicant from accepting gifts or donations from a service provider participating in the E-Rate program, with the exception of certain *de minimis* gifts or charitable donations unrelated to E-Rate procurement activities.[5]

On January 24, 2011, you pled guilty to wire fraud in connection with a scheme you devised and participated in to defraud the federal E-Rate program.[6] For a six-year period beginning in December 2001, as president and co-owner of CMS Internet LLC (''CMS'')[7] you induced two prospective school district applicants in Western Michigan to hire CMS as their E-Rate vendor by (1) falsely representing to the applicants that they could participate in the program at no cost to them;[8] (2) compensating the school districts for their E-Rate expenses with either purported ''donations'' or ''leasing payments'' that were calculated to coincide with the amount of each school's non-discounted share of E-Rate expenses;[9] and (3) submitting materially false and fraudulent applications to order ineligible and undisclosed goods and services that were paid for out of overcharges to the E-Rate program.[10] In further violation of the E-Rate rules, you gave gifts to a school district employee that included a wide screen television and entertainment system, which you paid for through overcharges to the E-Rate program.[11]

Furthermore, in responding to an audit conducted in 2006 by the Universal Service Administration Company (''USAC''), you transmitted by electronic mail fraudulent invoices that falsely stated a school district applicant had paid its share of E-Rate program expenses during 2006–2007. In addition, you failed to disclose that E-Rate funding was used to purchase ineligible goods and services.[12] Finally, you obstructed a 2007 federal grand jury investigation by instructing a CMS employee to testify falsely before the grand jury about receiving gifts, and to destroy E-Rate program records and remove the hard drives located on that employee's work and home computer in exchange for new computer hard drives.[13] Your scheme caused the E-Rate program to suffer an estimated loss between $30,000 and $70,000.[14] These actions constitute the conduct or transactions upon which this suspension notice and debarment proceeding are based.[15]

On June 21, 2011, the United States District Court for the Western District of Michigan sentenced you to serve 15 months in prison followed by two years of supervised release for defrauding the federal E-Rate program.[16] The court also prohibited you from ''having any involvement with any government-backed or federally-regulated programs during the course of supervision.''[17] Finally, the court ordered you to pay a $12,000 fine, in addition to compensating USAC by paying $115,534 in restitution.[18]

Pursuant to § 54.8(b) of the Commission's rules,[19] upon your conviction, the Bureau is required to suspend you from participating in any activities associated with or related to the schools and libraries support mechanism, including the receipt of funds or discounted services through the schools and libraries support mechanism, or consulting with, assisting, or advising applicants or service providers regarding the schools and libraries support mechanism.[20] Your suspension becomes effective upon receipt of this letter or publication of the notice in the **Federal Register,** whichever comes first.[21]

In accordance with the Commission's debarment rules, you may contest this suspension or the scope of this suspension by filing arguments, with any relevant documents, within 30 calendar days after receipt of this letter or after a notice is published in the **Federal Register,** whichever comes first.[22] Such requests, however, will not ordinarily be granted.[23] The Bureau may reverse or limit the scope of suspension only upon a finding of extraordinary circumstances.[24] Absent extraordinary circumstances, the Bureau will decide any request to reverse or modify a suspension within 90 calendar days of its receipt of such request.[25]

II. Initiation of Debarment Proceedings

As discussed above, your guilty plea and conviction of criminal conduct in connection with the E-Rate program serves as a basis for

[1] Any further reference in this letter to ''your conviction'' refers to your conviction in *United States* v. *Jeremy R. Sheets,* Criminal Docket No. 1:10–cr–380–1, Judgment (W.D. Mi. 2011) (*''Judgment''*).

[2] 47 CFR 54.8; 47 CFR 0.111 (delegating to the Enforcement Bureau authority to resolve universal service suspension and debarment proceedings). The Commission adopted debarment rules for the schools and libraries universal service support mechanism in 2003. *See Schools and Libraries Universal Service Support Mechanism,* Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202 (2003) (*''Second Report and Order''*) (adopting § 54.521 to suspend and debar parties from the E-rate program). In 2007 the Commission extended the debarment rules to apply to all Federal universal service support mechanisms. *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight; Federal-State Joint Board on Universal Service; Schools and Libraries Universal Service Support Mechanism; Rural Health Care Support Mechanism; Lifeline and Link Up; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.,* Report and Order, 22 FCC Rcd 16372 App. C at 16410–12 (2007) (*Program Management Order*) (§ 54.521 of the universal service debarment rules was renumbered as § 54.8 and subsections (a)(1), (5), (c), (d), (e)(2)(i), (3), (e)(4), and (g) were amended.)

[3] *Second Report and Order,* 18 FCC Rcd at 9225, Paragraph 66; *Program Management Order,* 22 FCC Rcd at 16387, Paragraph 32. The Commission's debarment rules define a ''person'' as ''[a]ny individual, group of individuals, corporation, partnership, association, unit of government or legal entity, however organized.'' 47 CFR 54.8(a)(6).

[4] 47 CFR 54.503 (2010).

[5] 47 CFR 54.503(d) (2010). *See also, Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future,* Sixth Report and Order, 25 FCC Rcd 18762 Paragraphs 88–90 (2010), *clarified by, Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future,* Order, 25 FCC Rcd 17324 (2010).

[6] *United States v. Jeremy R. Sheets,* Case No. 1:10–cr–380, Criminal Minute Sheet (W.D. Mi. 2011). See Justice News, Dep't of Justice, Michigan Businessman Sentenced to 15 months in Prison for Defrauding the Federal E-Rate Program, July 18, 2011, at *http://www.justice.gov/opa/pr/2011/July/11-at-935.html* (*''Press Release''*).

[7] CMS Internet, LLC provides internet access and related technology services to various school districts that participate in the federal E-Rate program. *See* U.S. v. Sheets, Case No. 1:10–cr–380, Felony Information at 1 (W.D. Mi. 2010) (*''Felony Information''*).

[8] *United States v. Jeremy R. Sheets,* Case No. 1:10–cr–380, Plea Agreement at 3 (W.D. Mi. 2010) (*''Plea Agreement''*).

[9] In July 2004, Mr. Sheets donated $20,458.25 to one school district, and purported to ''lease'' the other school district's radio towers with the intent to repay the school districts for their share of E-Rate expenses. *Id.*; Felony Information at 3.

[10] Plea Agreement at 4.

[11] *Id.* at 5.

[12] *Id.*

[13] *Id.* at 5–7.

[14] *Id.* at 4.

[15] *Second Report and Order,* 18 FCC Rcd at 9226, Paragraph 70; 47 CFR 54.8(e)(2)(i).

[16] *Judgment* at 3.

[17] *Id.* A condition of your supervised release includes forfeiting all monetary claims pending under contract with other E-Rate school applicants. Telephone Conversation with Jason Turner, Lead Counsel, Dep't of Justice, Antitrust Division (Aug. 10, 2011).

[18] *Judgment* at 5. You were also ordered to immediately pay a $100 Special Assessment. *Id.*

[19] 47 CFR 54.8(a)(4). *See Second Report and Order,* 18 FCC Rcd at 9225–9227, Paragraphs 67–74.

[20] 47 CFR 54.8(a)(1), (d).

[21] *Second Report and Order,* 18 FCC Rcd at 9226, Paragraph 69; 47 CFR 54.8(e)(1).

[22] 47 CFR 54.8(e)(4).

[23] *Id.*

[24] 47 CFR 54.8(f).

[25] *Second Report and Order,* 18 FCC Rcd at 9226, Paragraph 70; 47 CFR 54.8(e)(5), (f).

immediate suspension from the program, as well as a basis to commence debarment proceedings against you. Conviction of criminal fraud is cause for debarment.[26] Therefore, pursuant to § 54.8(b) of the rules, your conviction requires the Bureau to commence debarment proceedings against you.[27]

As with the suspension process, you may contest the proposed debarment or the scope of the proposed debarment by filing arguments and any relevant documentation within 30 calendar days of receipt of this letter or publication in the **Federal Register,** whichever comes first.[28] The Bureau, in the absence of extraordinary circumstances, will notify you of its decision to debar within 90 calendar days of receiving any information you may have filed.[29] If the Bureau decides to debar you, its decision will become effective upon either your receipt of a debarment notice or publication of the decision in the **Federal Register,** whichever comes first.[30]

If and when your debarment becomes effective, you will be prohibited from participating in activities associated with or related to the schools and libraries support mechanism for three years from the date of debarment.[31] The Bureau may set a longer debarment period or extend an existing debarment period if necessary to protect the public interest.[32]

Please direct any response, if sent by messenger or hand delivery, to Marlene H. Dortch, Secretary, Federal Communications Commission, 445 12th Street SW., Room TW–A325, Washington, DC 20554, to the attention of Joy M. Ragsdale, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Room 4–A236, with a copy to Theresa Z. Cavanaugh, Acting Division Chief, Investigations and Hearings Division, Enforcement Bureau, Room 4–C322, Federal Communications Commission. All messenger or hand delivery filings must be submitted without envelopes.[33] If sent by commercial overnight mail (other than U.S. Postal Service (USPS) Express Mail and Priority Mail), the response must be sent to the Federal Communications Commission, 9300 East Hampton Drive, Capitol Heights, Maryland 20743. If sent by USPS First Class, Express Mail, or Priority Mail, the response should be addressed to Joy Ragsdale, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street SW., Room 4–A236, Washington, DC 20554, with a copy to Theresa Z. Cavanaugh, Acting Division Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street SW., Room 4–C322, Washington, DC 20554. You shall also transmit a copy of your response via email to Joy M. Ragsdale, *joy.ragsdale@fcc.gov* and to Theresa Z. Cavanaugh, *Terry.Cavanaugh@fcc.gov.*

If you have any questions, please contact Ms. Ragsdale via U.S. postal mail, email, or by telephone at (202) 418–7931. You may contact me at (202) 418–1420 or at the email addressed noted above if Ms. Ragsdale is unavailable.

Sincerely yours,

Theresa Z. Cavanaugh

Acting Chief
Investigations and Hearings Division
Enforcement Bureau

cc: Johnnay Schrieber, Universal Service Administrative Company (via email)
Rashann Duvall, Universal Service Administrative Company (via email)
Jason C. Turner, Antitrust Division, United States Department of Justice (via email)
Jennifer M. Dixton, Antitrust Division, United States Department of Justice (via email)
Meagan D. Johnson, Antitrust Division, United States Department of Justice (via email)

[FR Doc. 2011–28683 Filed 11–4–11; 8:45 am]

BILLING CODE 6712–01–P

[26] ''Causes for suspension and debarment are conviction of or civil judgment for attempt or commission of criminal fraud, theft, embezzlement, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice and other fraud or criminal offense arising out of activities associated with or related to the schools and libraries support mechanism, the high-cost support mechanism, the rural healthcare support mechanism, and the low-income support mechanism.'' 47 CFR 54.8(c). Associated activities ''include the receipt of funds or discounted services through [the Federal universal service] support mechanisms, or consulting with, assisting, or advising applicants or service providers regarding [the Federal universal service] support mechanisms.'' 47 CFR 54.8(a)(1).

[27] 47 CFR 54.8(b).

[28] *Second Report and Order,* 18 FCC Rcd at 9226, Paragraph 70; 47 CFR 54.8(e)(3).

[29] *Id.,* 18 FCC Rcd at 9226, Paragraph 70; 47 CFR 54.8(e)(5).

[30] *Id.* The Commission may reverse a debarment, or may limit the scope or period of debarment upon a finding of extraordinary circumstances, following the filing of a petition by you or an interested party or upon motion by the Commission. 47 CFR 54.8(f).

[31] *Second Report and Order,* 18 FCC Rcd at 9225, Paragraph 67; 47 CFR 54.8(d), (g).

[32] *Id.*

[33] *See* FCC *Public Notice,* DA 09–2529 for further filing instructions (rel. Dec. 3, 2009).

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than November 22, 2011.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Gregory R. Raymo Revocable Living Trust Agreement, and Barbara J. Raymo,* individually and as Co-Trustee, both of Worthington, Minnesota; to join the Gregory Raymo family group that currently consists of Gregory Raymo, and the First State Bank Southwest 2010 Amended and Restated KSOP Plan and Trust, Worthington, Minnesota, and acquire control of First Rushmore Bancorporation, Inc., Worthington, Minnesota, and thereby indirectly acquire control of First State Bank Southwest, Pipestone, Minnesota.

2. *Patrick D. Wenning, and Pilar Wenning,* both of Mound, Minnesota; to retain voting shares of Tradition Bancshares, Inc., and thereby indirectly retain control of Tradition Capital Bank, both in Edina, Minnesota.

Board of Governors of the Federal Reserve System, November 2, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–28760 Filed 11–4–11; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Annual Statistical Report on Children in Foster Homes and Children in Families Receiving Payment in Excess of the Poverty Income Level from a State Program Funded Under Part A of Title IV of the Social Security Act.

OMB No.: 0970–0004.

Description: The Department of Health and Human Services is required to collect these data under section 1124 of Title I of the Elementary and Secondary Education Act, as amended by Public Law 103–382. The data are used by the U.S. Department of Education for allocation of funds for programs to aid disadvantaged elementary and secondary students. Respondents include various components of State Human Service agencies.

Respondents: The 52 respondents include the 50 States, the District of Columbia, and Puerto Rico.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Annual Statistical Report on Children in Foster Homes and Children Receiving Payments in Excess of the Poverty Level From a State Program Funded Under Part A of Title IV of the Social Security Act	52	1	264.35	13,746.20

Estimated Total Annual Burden Hours: 13,746.20.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, *Fax:* (202) 395–7285, *Email: OIRA_SUBMISSION@OMB.EOP.GOV, Attn:* Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011–28718 Filed 11–4–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Methodology for Determining Whether an Increase in a State's Child Poverty Rate is the Result of the TANF Program.

OMB No.: 0970–0186.

Description: In accordance with Section 413(i) of the Social Security Act and 45 CFR part 284, the Department of Health and Human Services (HHS) intends to reinstate the following information collection requirements. For instances when Census Bureau data show that a State's child poverty rate increased by 5 percent or more from one year to the next, a State may submit independent estimates of its child poverty rate. If HHS determines that the State's independent estimates are not more reliable than the Census Bureau estimates, HHS will require the State to submit an assessment of the impact of the Temporary Assistance for Needy Families (TANF) program(s) in the State on the child poverty rate. If HHS determines from the assessment and other information that the child poverty rate in the State increased as a result of the TANF program(s) in the State, HHS will then require the State to submit a corrective action plan.

Respondents: The respondents are the 50 States, the District of Columbia and Puerto Rico; when reliable Census Bureau data become available for the Territories, additional respondents might include Guam and the Virgin Islands.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Optional Submission of Data on Child Poverty from an Independent Source	52	1	8	416
Assessment of the Impact of TANF on the Increase in Child Poverty	52	1	120	6,240
Corrective Action Plan	52	1	160	8,320

Estimated Total Annual Burden Hours: 14,976.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: (202) 395–7285, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011–28700 Filed 11–4–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Statement of Organization, Functions, and Delegations of Authority; Office of the Deputy Assistant Secretary for Administration

AGENCY: Administration for Children and Families, HHS.

ACTION: Notice.

SUMMARY: Statement of Organizations, Functions, and Delegations of Authority.

The Administration for Children and Families (ACF) has reorganized the Office of the Deputy Assistant Secretary for Administration (ODASA). This reorganization renames the Office of Management Resources (OMR) to the Office of Workforce Planning and Development. In addition, it realigns the ethics, facilities, security and travel functions formerly located in OMR to the Immediate Office of the Deputy Assistant Secretary for Administration.

FOR FURTHER INFORMATION CONTACT: Jason Donaldson, Deputy Assistant Secretary for Administration, 901 D Street SW., Washington, DC 20447, (202) 401–9238.

This notice amends Part K of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (HHS), Administration for Children and Families (ACF) as follows: Chapter KP, Office of the Deputy Assistant Secretary for Administration, (ODASA), as last amended, 71 FR 59117–59123, October 6, 2006.

I. Under Chapter KP, Office of the Deputy Assistant Secretary for Administration, KP.00 Mission, delete in its entirety and replace with the following:

KP.00 Mission. The Deputy Assistant Secretary for Administration serves as principal advisor to the Assistant Secretary for Children and Families on all aspects of personnel administration and management; information resource management; financial management activities; grants policy and overseeing the issuance of grants; procurement issues; the ethics program; staff development and training activities; organizational development and organizational analysis; administrative services; facilities management; and State systems policy. The Deputy Assistant Secretary for Administration oversees the ACF Equal Employment Opportunity and Civil Rights program and all administrative special initiative activities for ACF.

II. Under Chapter KP, Office of the Deputy Assistant Secretary for Administration, KP.10 Organization, delete in its entirety and replace with the following:

KP.10 Organization. The Office of the Deputy Assistant Secretary for Administration is headed by the Deputy Assistant Secretary who reports to the Assistant Secretary for Children and Families. The Office is organized as follows:

Immediate Office of the Deputy Assistant Secretary for Administration (KPA)
Office of Information Services (KPB)
Office of Financial Services (KPC)
Office of Workforce Planning and Development (KPD)
Office of Grants Management (KPG)
Grants Management Regional Units (KPGDI–X)

III. Under Chapter KP, Office of the Deputy Assistant Secretary for Administration, KP.20 Functions, paragraph A, delete in its entirety and replace with the following:

KP.20 Functions. A. The Immediate Office of the Deputy Assistant Secretary for Administration (ODASA) directs and coordinates all administrative activities for the Administration for Children and Families (ACF). The Deputy Assistant Secretary for Administration serves as ACF's: Chief Financial Officer; Chief Grants Management Officer; Federal Manager's Financial Integrity Act (FMFIA) Management Control Officer; Principal Information Resource Management Official serving as Chief Information Officer; Deputy Ethics Counselor; Personnel Security Representative; and Reports Clearance Officer. The Deputy Assistant Secretary for Administration serves as the ACF liaison to the Office of the General Counsel, and as appropriate, initiates action in securing resolution of legal matters relating to management of the agency, and represents the Assistant Secretary on all administrative litigation matters.

The Deputy Assistant Secretary for Administration represents the Assistant Secretary in HHS and with other Federal agencies and task forces in defining objectives and priorities, and in coordinating activities associated with Federal reform initiatives. ODASA provides leadership of assigned ACF special initiatives arising from Departmental, Federal and non-Federal directives to improve service delivery to customers.

The Deputy Assistant Secretary for Administration provides day-to-day executive leadership and direction to the Immediate Office of the Deputy Assistant Secretary, Office of Information Services, Office of Financial Services, Office of Workforce Planning and Development, and the Office of Grants Management. The Immediate Office of the Deputy Assistant Secretary for Administration consists of the Deputy Director, Chief of Staff, and the Management Operations Team (formerly referred to as the Administrative Team), the Budget Team, Facilities Team, and Ethics Team.

The Management Operations Team coordinates human capital management needs within ODASA. The Team provides leadership, guidance, oversight and liaison functions for ODASA personnel related issues and activities as well as other administrative functions within ODASA. The Management Operations Team coordinates with the Office of Workforce Planning and Development to provide ODASA staff with a full array of personnel services, including position management, performance management, employee recognition, staffing, recruitment, employee and labor relations, employee worklife, payroll liaison, staff development, training services, and special hiring and placement programs. The Team develops and implements ACF travel policies and procedures consistent with Federal requirements. The Team provides technical assistance and oversight; coordinates ACF's use of the Travel Management System; manages employee participation in the Travel Charge Card program, and coordinates Travel Management Center services for ACF. It purchases and tracks common use supplies, stationery and publications. It plans and manages reprographic services.

The Budget Team manages the formulation and execution of ODASA's Federal administration budget and assigned ACF program and common expense budgets. The Budget Team maintains budgetary controls on ODASA accounts, reconciling accounting reports and invoices, and monitoring all spending. The Team develops, defends and executes the assigned funds for rent, repair and alterations, facilities activities, telecommunication, information technology, personnel services and training. The Team also controls ODASA's credit card for small purchases.

The Facilities Team is responsible for planning, managing, and directing ACF's facility, safety, security, and emergency management programs. The Team serves as the lead for ACF in coordination and liaison with Departmental, GSA and other Federal agencies on implementation of Federal

facility and security directives. The Facilities Team serves as lead and coordinator for all tenant matters in ACF Headquarter locations. The Team coordinates facility activities for ACF's regional offices. The Team is responsible for planning and executing ACF's environmental health program, and ensuring that appropriate occupational health and safety plans are in place. The Team is responsible for issuing, managing and controlling badge and cardkey systems to control access to agency space for security purposes. The Team provides, prepares, coordinates, and disseminates information, policy and procedural guidance on administrative and materiel management issues on an agency-wide basis. It directs and/or coordinates management initiatives to improve ACF administrative and materiel management services with the goal of continually improving services while containing costs. The Team establishes and manages contracts and/or blanket purchase agreements for administrative support and materiel management services, including space design, building alteration and repair, reprographics, moving, labor, property management and inventory, systems furniture acquisitions and assembly, and fleet management. The Team provides management and oversight of ACF mail delivery services and activities, including Federal and contractor postal services nationwide, covering all classes of U.S. Postal Service mail, priority and express mail services, and courier services, etc. The Team plans, manages/operates employee transportation programs, including shuttle service and fleet management; employee and visitor parking. The Team directs all activities associated with the ACF Master Housing Plan, including coordination and development of the agency long-range space budget; planning, budgeting, identification, solicitation, acceptance and utilization of office and special purpose space, repairs, and alterations; serving as principal liaison with GSA and other Federal agencies, building managers and materiel engineers, architects and commercial representatives, for space acquisitions, negotiation of lease terms, dealing with sensitive issues such as handicapped barriers, and space shortages. It develops and maintains space floor plans and inventories, directory boards, and locator signs. The Team serves as principal liaison with private and/or Federal building managers for all administrative services and materiel management activities. The Team develops and implements policies and procedures for the ACF Personal Property Management program, including managing the ACF Personal Property Inventory, and other personal property activities.

The Ethics Team manages the agency-wide ethics program and ensures that the agency and ACF employees are in compliance with the Executive Branch Standards of Ethical Conduct, the HHS Supplemental Standards of Ethical Conduct, the criminal conflict of interest statutes, and other ethics related laws and regulations. The Agency-wide ethics program includes the public financial disclosure reporting system, confidential financial disclosure reporting system, outside activity prior approval and annual report process, non-federal source cash or in-kind travel reimbursement, procurement integrity enforcement, standards of ethical conduct determinations, conflicts resolution, advisory committees ethics program, advice and counsel, education and training, and enforcement. The Ethics Team Officer reports directly to the DASA, who serves as the Deputy Ethics Counselor.

IV. Under Chapter KP, Office of the Deputy Assistant Secretary for Administration, KP.20 Functions, paragraph D, delete in its entirety and replace with the following:

D. The Office of Workforce Planning and Development (OWPD) advises the Deputy Assistant Secretary for Administration on human resource management, and organizational and employee development activities for ACF. OWPD provides leadership, direction and oversight for human resource management services provided to ACF through a contract and supplemental memoranda of understanding (MOUs) with the Program Support Center (PSC). OWPD, in collaboration and coordination with the PSC, provides advice and assistance to ACF managers in their personnel management activities, including recruitment, selection, position management, performance management, designated performance and incentive awards and employee assistance programs and other services to ACF employees. OWPD provides management, direction and oversight of the following personnel administrative services: the exercise of appointing authority, position classification, awards authorization, performance management evaluation, personnel action processing and recordkeeping, merit promotion, special hiring, and placement programs. OWPD serves as liaison between ACF, the Department, and the Office of Personnel Management. It provides technical advice and assistance on personnel policy, regulations, and laws. OWPD formulates and interprets policies pertaining to existing personnel administration and management matters and formulates and interprets new human resource programs and strategies. The Office, in collaboration and coordination with the PSC, provides oversight and management advisory services on all ACF employee relations issues. The Office plans and coordinates ACF employee relations and labor relations activities, including the application and interpretation of the Federal Labor Management Relations Program collective bargaining agreements, disciplinary and adverse action regulations and appeals. The Office participates in the formulation and implementation of policies, practices and matters affecting bargaining unit employees' working conditions by assuring management's compliance with the Federal Labor Relations Program (5 U.S.C. Chapter 71). The Office maintains oversight, leadership and direction of the labor-management and employee relations services provided under contract with the PSC.

OWPD is responsible for formulation, planning, analysis and development of ACF human resource policies and programs, workforce planning, and liaison functions to the Department on ACF payroll matters. The Office formulates and oversees the implementation of ACF-wide policies, regulations and procedures concerning all aspects of the Senior Executive Service (SES), and SES-equivalent recruitment, staffing, position establishment, compensation, award, performance management and related personnel areas. The Office manages the ACF SES performance recognition systems and provides services for functions of the Executive Secretary to the Executive Resources Board and the Performance Review Board. OWPD coordinates Schedule C and executive personnel activity with the Office of the Secretary and is the focal point for data, reports and analyses relating to Schedule C, SES and Executive-level personnel. OWPD advises the Deputy Assistant Secretary for Administration on organizational analysis and development including: delegations of authority; planning for new organizational elements; and planning, organizing and performing studies, analyses and evaluations related to structural, functional and organizational issues, problems, and policies to ensure organizational effectiveness. The Office

administers ACF's system for review, approval and documentation of delegations of authority. The Office provides technical assistance and guidance to ACF offices on intra-component organizational proposals and is responsible for development and/or review of inter-component organizational proposals. The Office develops policies and procedures for implementing organizational development activities and provides leadership of assigned ACF special initiatives arising from Departmental, Federal and non-Federal directives to improve service delivery to customers and to enhance employee work environment. The Office manages and coordinates designated incentive awards programs. The Office develops training policies and plans for ACF. It provides leadership in directing and managing Agency-wide staff development and training activities for ACF. OWPD is responsible for the functional management of all information technology and software training, common needs training, and management training in the Agency, including policy development, guidance, technical assistance, and evaluation of all aspects of career employee, supervisory, management and executive training. The Office provides leadership in managing/overseeing and monitoring the ACF Training Resource Center and the Computer Training and Information Centers. The Office develops and manages the consolidated training budget for the Agency.

Dated: October 25, 2011.

George H. Sheldon,

Acting Assistant Secretary for Children and Families.

[FR Doc. 2011–28675 Filed 11–4–11; 8:45 am]

BILLING CODE 4184–40–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0771]

Draft Blueprint for Prescriber Education for Long-Acting/Extended-Release Opioid Class-Wide Risk Evaluation and Mitigation Strategy; Availability; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft document entitled ''Blueprint for Prescriber Education for the Long-Acting/Extended-Release Opioid Class-Wide REMS'' (Blueprint). The draft Blueprint contains core messages intended for use by continuing education (CE) providers to develop educational materials to train prescribers of long-acting and extended-release opioids under the required risk evaluation and mitigation strategy (REMS) for these products (Opioid REMS). FDA seeks stakeholder input on the document. After comments are received, FDA will revise the Blueprint as appropriate, incorporate it into the Opioid REMS when it is approved, and post it on FDA's Web site for use by CE providers.

DATES: Submit either electronic or written comments on the draft Blueprint by December 7, 2011.

ADDRESSES: See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft Blueprint. Submit electronic comments on the draft Blueprint to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Michie I. Hunt, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6153, Silver Spring, MD 20993–0002, (301) 796–3504.

SUPPLEMENTARY INFORMATION:

I. Background

The Food and Drug Administration Amendments Act of 2007 (FDAAA) gave FDA the authority to require manufacturers to develop and implement a REMS when necessary to ensure the benefits of a drug or biological product outweigh its risks.

A. REMS for Long-Acting and Extended-Release Opioids

On February 6, 2009, FDA sent letters to manufacturers of certain opioid drug products indicating that these drugs will be required to have a REMS to ensure that the benefits of the drugs continue to outweigh the risks.[1] The affected opioid drugs include long-acting and extended-release brand name and generic products and are formulated with the active ingredients buprenorphine, fentanyl, hydromorphone, methadone, morphine, oxycodone, oxymorphone, and tapentadol. After sending the letters, FDA held a series of meetings with stakeholders and convened an advisory committee to obtain input on the appropriate elements of the Opioid REMS.

On April 19, 2011, in conjunction with the Office of National Drug Control Policy (ONDCP) release of the Obama Administration's *Epidemic: Responding to America's Prescription Drug Abuse Crisis*—a comprehensive action plan to address the national prescription drug abuse epidemic, FDA issued letters to application holders directing them to submit a REMS within 120 days and describing the elements that needed to be included in the REMS (REMS notification letters). The central component of the Opioid REMS program is an education program for prescribers (*e.g.,* physicians, nurse practitioners, physician assistants) and patients.

B. REMS Prescriber Education

In the REMS notification letters, FDA provided an outline of the required prescriber education. The outline specified that the education must include information on weighing the risks and benefits of opioid therapy, choosing patients appropriately, managing and monitoring patients, and counseling patients on the safe use of these drugs. In addition, the education must include information on how to recognize evidence of, and the potential for, opioid misuse, abuse, and addiction. The REMS notification letters stated that although there is no mandatory requirement that prescribers take the course as a precondition to dispensing the medication to patients, application holders will be required to establish goals for the number of prescribers trained, collect the information about the number of prescribers who took the courses, and report the information to FDA as part of periodic required assessments.

C. CE Providers Will Conduct Prescriber Education

The REMS notification letter expressed FDA's expectation that the training would be conducted by accredited, independent continuing education providers. FDA later elaborated on its vision for prescriber education stating that we expect the CE training to be provided without cost to the healthcare professionals and that sponsors would offer unrestricted grants to accredited CE providers to develop CE for the appropriate prescriber

[1] See the Opioid REMS Meeting Invitation Template at *http://www.fda.gov/downloads/Drugs/DrugSafety/InformationbyDrugClass/UCM163652.pdf* and the Opioids Products Chart at *http://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm163654.htm.*

groups.[2] We believe having the training provided by CE organizations will be an incentive and will not create new burdens on prescribers because most healthcare professionals are routinely engaged in CE activity.

D. The Blueprint Will Provide the Basic Outline and Core Messages for CE

In response to the April REMS notification letter, application holders, through an industry working group, submitted an expanded outline of the potential topics to be covered in the CE, noting that education incorporating all of the topics in the outline could require 30 or more hours of education. FDA's expectation is that the initial or basic REMS related CE that should be offered to all prescribers of long-acting and extended-release opioids should consist of a ''core'' content of about 2 to 3 hours. FDA has reviewed the industry submission and developed a basic outline and the core messages that FDA believes should be conveyed to prescribers in this basic educational module. After it is completed and approved as part of the REMS, the Blueprint will be posted on FDA's Web site for use by CE providers in developing CE courses. Although FDA recognizes that additional training modules could be helpful, FDA's goal is to require basic education for all prescribers of long-acting and extended-release opioids, and at this time, FDA does not intend to develop or approve messages as part of the REMS beyond those approved in the basic core module. Using the Blueprint on FDA's Web site, CE providers can develop accredited CE in the manner they choose.[3]

With this document, FDA is announcing the availability of the Agency's draft Blueprint for prescriber education and soliciting public comment. The draft Blueprint is available on the Internet at *www.fda.gov/downloads/Drugs/DrugSafety/InformationbyDrugClass/UCM277916.pdf*. FDA will consider any comments submitted and make appropriate revisions before approving the Blueprint as a part of the Opioid REMS.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments on the draft Blueprint. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: November 1, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–28669 Filed 11–4–11; 8:45 am]

BILLING CODE 4160–01–P

[2] See FDA Opioid REMS Meeting with Industry (May 16, 2011), at *http://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm258184.htm* and Preliminary Responses to Industry Questions About Opioid REMS at *http://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm258113.htm.*

[3] Since early May 2011, FDA has held teleconferences and met with representatives from the CE accreditor and provider communities. We have expressed our interest in understanding the challenges of the CE providers, including the need to be in compliance with the Accreditation Council for Continuing Medical Education (ACCME) Standards for Commercial Support and the need to ensure that the content of CE remains beyond the control of industry. We are confident that the ACCME standards will be met and ACCME will be satisfied that FDA will control the content of REMS CE.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0689]

Draft Guidance for Industry and Food and Drug Administration Staff; De Novo Classification Process (Evaluation of Automatic Class III Designation); Availability; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending to January 3, 2012, the comment period for the notice entitled ''Draft Guidance for Industry and Food and Drug Administration Staff; De Novo Classification Process (Evaluation of Automatic Class III Designation); Availability,'' that appeared in the **Federal Register** of October 3, 2011 (76 FR 61103). In that document, FDA announced the availability of a draft guidance for industry and FDA staff and requested comments. The Agency is taking this action due to a discrepancy in the comment period in the notice as compared to the comment period listed in the guidance document.

DATES: Submit either electronic or written comments by January 3, 2012.

ADDRESSES: Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane Rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT:
Melissa Burns, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 66, Rm. 1646, Silver Spring, MD 20993–0002, (301) 796–5616; or
Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville, Pike, Suite 200N, Rockville, MD 20852, (301) 827–6210.

I. Background

In the **Federal Register** of October 3, 2011 (76 FR 61103), FDA published a notice with a 60-day comment period to request comments on the draft guidance for industry and FDA staff entitled ''*De Novo* Classification Process (Evaluation of Automatic Class III Designation).'' Comments on the draft guidance will assist FDA in the development of a final guidance for industry and FDA staff on the de novo classification process.

The Agency received a comment that the 60-day comment period in the notice was inconsistent with the 90-day comment period in the draft guidance document. FDA is extending the comment period for the notice until January 3, 2012. The Agency believes that this extension allows adequate time for interested persons to submit comments without significantly delaying action by the Agency.

II. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. A search capability for all Center for Devices and Radiological Health (CDRH) guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available

at *http://www.regulations.gov* or from the Center for Biologics Evaluation and Research at *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm.* To receive ''*De Novo* Classification Process (Evaluation of Automatic Class III Designation)'' from CDRH you may either send an email request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to (301) 847–8149 to receive a paper copy. Please use the document number 1769 to identify the guidance you are requesting.

Dated: November 1, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–28766 Filed 11–4–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0427]

Guidance for Industry: Clinical Considerations for Therapeutic Cancer Vaccines; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a document entitled ''Guidance for Industry: Clinical Considerations for Therapeutic Cancer Vaccines'' dated October 2011. The guidance document provides sponsors who wish to submit an Investigational New Drug application (IND) for a therapeutic cancer vaccine with recommendations on critical clinical considerations for investigational studies of these products. The guidance also provides recommendations for the design of clinical trials for cancer vaccines conducted under an IND to support a subsequent biologics license application (BLA) for marketing approval. The guidance applies to therapeutic cancer vaccines that are intended for the treatment of patients with an existing diagnosis of cancer. The guidance does not apply to vaccines for preventative and therapeutic infectious disease indications, to products intended to induce or augment a non-specific immune response, or to products intended to prevent or decrease the incidence of cancer in individuals without a prior history of that cancer. Furthermore, the guidance does not apply to adoptive immunotherapeutic products which may mediate their therapeutic effect by targeting the tumor directly, such as T cell or NK cell products. The guidance announced in this notice finalizes the draft guidance of the same title dated September 2009.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1 (800) 835–4709 or (301) 827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Lori Jo Churchyard, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, (301) 827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a document entitled ''Guidance for Industry: Clinical Considerations for Therapeutic Cancer Vaccines,'' dated October 2011. The guidance document provides sponsors who wish to submit an IND for a therapeutic cancer vaccine with recommendations on critical clinical considerations for investigational studies of these products. Further, the guidance provides recommendations for the design of clinical trials for cancer vaccines conducted under an IND (Title 21 Code of Federal Regulations (21 CFR) part 312) to support a subsequent BLA for marketing approval. The guidance is applicable to therapeutic cancer vaccines that are intended for the treatment of patients with an existing diagnosis of cancer. The guidance does not apply to vaccines for preventative and therapeutic infectious disease indications, to products intended to induce or augment a non-specific immune response, or to products intended to prevent, or decrease the incidence of cancer in individuals without a prior history of that cancer. Furthermore, the guidance does not apply to adoptive immunotherapeutic products which may mediate their therapeutic effect by targeting the tumor directly, such as T cell or NK cell products.

FDA has held or participated in several meetings to discuss development of cancer vaccines. For example, on February 8–9, 2007, CBER co-sponsored a workshop with the National Cancer Institute entitled ''Bringing Therapeutic Cancer Vaccines and Immunotherapies through Development to Licensure.'' In consideration of the input FDA received from stakeholders, the guidance provides recommendations for the design of clinical trials for cancer vaccines conducted under an IND to support a subsequent BLA for marketing approval.

In the **Federal Register** of September 18, 2009 (74 FR 47947), FDA announced the availability of the draft guidance of the same title dated September 2009. FDA received numerous comments on the draft guidance and those comments were considered as the guidance was finalized. Changes incorporated in the final guidance included adding new sections in response to comments, clarification of assay standardization, and additional references were included. In addition, organizational and editorial changes were made to improve clarity. The guidance announced in this notice finalizes the draft guidance dated September 2009.

The guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents FDA's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014; and the collection of information in 21 CFR part 50 on informed consent laws

have been approved under OMB control number 0910–0130.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: November 1, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–28726 Filed 11–4–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Bridging the Idea Development Evaluation Assessment and Long-Term Initiative and Total Product Life Cycle Approaches for Evidence Development for Surgical Medical Devices and Procedures; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration (FDA) is announcing a public workshop entitled ''Bridging the IDEAL and TPLC Approaches for Evidence Development for Surgical Medical Devices and Procedures.'' The purpose of the public workshop is to provide a forum for discussion among FDA, governmental agencies, academia, physicians, and various stakeholders to further refine and advance the Idea Development Evaluation Assessment and Long-Term (IDEAL) initiative and Total Product Life Cycle (TPLC) frameworks related to evidence generation and evaluation for surgical devices and procedures.

Date and Time: The meeting will be held on December 2, 2011, from 8 a.m. to 5:30 p.m. Participants are encouraged to arrive early to ensure time for parking and security screening before the meeting. Submit electronic and written comments by January 6, 2012.

Location: The public workshop will be held at the FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD 20993–0002. Entrance for the public meeting participants (non-FDA employees) is through Bldg. 1 where routine security check procedures will be performed. For parking and security information, please refer to *http://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

Contact Persons: Samantha Jacobs, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4113, Silver Spring, MD 20993, (301) 796–6897, email: *Samantha.jacobs@fda.hhs.gov;* or Danica Marinac-Dabic, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4113, Silver Spring, MD 20993, (301) 796–6689, email: *danica.marinac-dabic@fda.hhs.gov.*

Registration: There is no fee to attend the public workshop, but attendees must register in advance. Registration will be on a first-come, first-served basis. Persons interested in attending this workshop must register online at *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/* by November 25, 2011. Non-U.S. citizens are subject to additional security screening, and they should register as soon as possible. For those without Internet access, please call the contact person to register. Onsite registration is not available.

If you need special accommodations due to a disability, please contact Susan Monahan at *susan.monahan@fda.hhs.gov* at least 7 days in advance.

Comments: Regardless of attendance at the public workshop, interested persons may submit either electronic or written comments until January 6, 2012. Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. In addition, when responding to specific topics as outlined in section III of this document, please identify the topic you are addressing. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

SUPPLEMENTARY INFORMATION:

I. Why are we holding this public workshop?

The purpose of the public workshop is to facilitate discussion among FDA, governmental agencies, academia, clinicians, and the key stakeholders in the scientific community on issues related to evidence generation and evaluation for surgical devices and procedures. Based on complementary methodological frameworks of the IDEAL and TPLC initiatives, more comprehensive and applicable models and methodologies will be developed.

II. Who is the target audience for this public workshop? Who should attend this public workshop?

This workshop is open to all interested parties. The target audience is comprised of professionals in the scientific community interested in advancing the infrastructure and methodology for evaluating surgical devices and procedures.

III. What are the topics we intend to address at the public workshop?

We intend to discuss a large number of issues at the workshop, including, but not limited to, the following:

- The IDEAL and the FDA TPLC approach for evaluation of new medical devices, surgical operations, and invasive medical procedures;
- Unique study designs and reporting methods for evaluation of medical devices and surgeries;
- Innovative methodologies and scientific infrastructure to promote innovation;
- The role of registries and observational studies during device life cycle; and
- Integrating innovation, evaluation, and dissemination pathways for medical devices, surgical operations, and invasive medical procedures.

IV. Where can I find out more about this public workshop?

Background information on the public workshop, registration information, the agenda, information about lodging, and other relevant information will be posted, as it becomes available, on the Internet at *http://www.fda.gov/cdrh/meetings.html.*

Transcripts: Please be advised that as soon as a transcript is available, it will

be accessible at *http://www.regulations.gov.* It may be viewed at the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD. A transcript will also be available in either hardcopy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to the Division of Freedom of Information (ELEM–1029), Food and Drug Administration, 12420 Parklawn Dr., Element Bldg., Rockville, MD 20857.

Dated: November 1, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–28722 Filed 11–4–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0690]

Product Shortage Report; Availability; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a medical product shortage report entitled ''A Review of FDA's Approach to Medical Product Shortages.'' The Agency is making the report available by placing it in the docket opened for a previous public workshop on drug shortages. The report discusses the Agency's approach to product shortages, particularly those products regulated by the FDA Center for Drug Evaluation and Research (CDER). FDA requests comments, until December 23, 2011, on the report and its recommendations, including whether there are additional suggestions for recommendations and how we should prioritize work on these recommendations.

DATES: Submit either electronic or written comments by December 23, 2011.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Peter Lurie, Office of Policy and Planning, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 4220, Silver Spring, MD 20993–0002, (301) 796–4800.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 29, 2011 (76 FR 60505), FDA opened a comment period for a public workshop notice which published in the **Federal Register** of July 28, 2011 (76 FR 45268). This document announces the availability of a product shortage report by placing it in the docket of the public workshop on drug shortages. This report provides background information on product shortages, discusses four FDA product centers' various approaches to addressing product shortages, particularly those in CDER, and includes recommendations for FDA and others. FDA is requesting comment on the report and its recommendations, including whether there are additional suggestions for recommendations and how we should prioritize work on these recommendations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/ucm275051.htm* or *http://www.regulations.gov.*

Dated: October 31, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–28723 Filed 11–4–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Proposed Eligibility Criteria for the Centers of Excellence Program in Health Professions Education for Under-Represented Minority Individuals

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice.

SUMMARY: This notice requests comments on proposed eligibility criteria for the Centers of Excellence (COE) program in health professions education for under-represented minority (URM) individuals (See Title VII, Section 736 of the Public Health Service Act, 42 U.S.C. 293 (2011) as amended by the Patient Protection and Affordable Care Act, Public Law 111–148, § 5401 (2010)). When finalized, these eligibility criteria will be used to determine the eligibility of designated health professions schools to apply for COE funding in fiscal year (FY) 2012 and subsequent fiscal years. Funding is dependent on the availability of appropriated funds for the COE program. The designated health professions schools are schools of allopathic medicine, osteopathic medicine, dentistry, pharmacy, and graduate programs in behavioral or mental health. This does not apply to Historically Black Colleges and Universities (HBCUs) eligible to establish a COE, under PHS Act section 736(c)(2).

DATES: Interested persons are invited to comment within 30 days of the publication of this notice. All comments received on or before those 30 days complete will be considered.

ADDRESSES: All written comments concerning this notice should be submitted to Dr. Joan Weiss, Director, Division of Public Health and Interdisciplinary Education, at the contact information below.

FOR FURTHER INFORMATION CONTACT: Anyone requesting additional details should contact Dr. Joan Weiss, Bureau of Health Professions, Health Resources and Services Administration. Dr. Weiss may be reached in one of three following methods: (1) Via written request to: Dr. Joan Weiss, Designated Federal Official, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 9–36, 5600 Fishers Lane, Rockville, Maryland 20852; (2) via

telephone at (301) 443–6950; or (3) via email at *jweiss@hrsa.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: The COE program supports programs of excellence in health professions education for URM individuals in designated health professions schools. The categories of designated health professions schools subject to this notice are: (1) Hispanic, (2) Native American, and (3) ''Other'' health professions schools that meet the program requirements. Centers of Excellence provide academic enhancement programs to URM individuals; develop a large and competitive applicant pool to pursue health professions careers; and improve the capacity of schools to recruit, train, and retain URM faculty. The COE program facilitates faculty and student research on health issues particularly affecting URM groups. In addition, the program carries out activities to improve information resources, clinical education, curricula and cultural competence of schools' graduates relating to minority health issues. Training students to provide health services to a significant number of URM individuals at community-based health facilities and providing financial assistance, as available and appropriate, are also required.

Eligibility Criteria: To be eligible for funding, the PHS Act requires designated health professions schools to meet each of four criteria. The schools must: (1) Have a significant number of URM students enrolled, including individuals accepted for enrollment; (2) have been effective in assisting URM students to complete their educational program and receive the degree involved; (3) have been effective in recruiting URM students to enroll in and graduate from the school, including providing scholarships and other financial assistance and encouraging URM students at all levels of the educational pipeline to pursue health professions careers; and (4) have made significant recruitment efforts to increase the number of URM individuals serving in faculty or administrative positions at the school.

The COE program aims to support institutions with a commitment to URMs, which includes demonstrated effectiveness in recruiting, teaching, training, and retaining current and future URM health professionals, both as practitioners and as faculty. This announcement details the proposed approach that the Secretary will use to assess whether schools and other eligible entities meet the eligible criteria defined in statute. Beginning in FY 2012, the following approach will be used to assess whether applicants meet eligibility criteria.

A. Criterion one: The school must have a significant number of URM students enrolled in the designated health professions education program. The Secretary will determine the significant number for Hispanic and Native American COEs based on a percentage of the current number of URM students enrolled in these schools. This determination is unnecessary, however, for HBCUs because they meet the significant number condition by virtue of their definition. With respect to the eligible ''Other'' COE health professions schools, the PHS Act requires these schools to have a current enrollment of URMs above the national average.

B. Criterion two: The second criterion requires designated health professions schools to be effective in assisting its URM students to successfully complete the program of education and to receive the appropriate professional degree. Graduation rates are calculated, determined, and provided by health professions schools applying for COE funding. To account for varying class sizes across the health professions schools, the graduation rate eligibility thresholds for Hispanic, Native American, and ''Other'' COEs in the designated health professions will be determined using the following procedure:

1. Health professions schools and programs will be ranked according to the percentage of URMs (*e.g.,* Hispanic, Native American, or ''Other'') successfully graduating from such health professions schools or programs with degrees each year, as calculated by the total number of URM students graduating from the health professions school with degrees divided by the total number of students graduating with degrees in a given health professions school.

2. The top quartile (75th percentile) will serve as the eligibility threshold for Hispanic, Native American, and ''Other'' COE applicants.

3. The Integrated Postsecondary Education Data System (IPEDS) Completions survey will provide the raw data for threshold analysis. IPEDS is a system of interrelated completed surveys conducted annually by the U.S. Department of Education's National Center for Education Statistics (NCES). The IPEDS collects data on postsecondary education in the United States, including the number of students who complete a postsecondary education program by type of program and level of award (certificate or degree). The IPEDS is available at *http://nces.ed.gov/ipeds/datacenter/DataFiles.aspx.* Separate thresholds will be calculated and established for each of the following four categories: Allopathic and osteopathic medicine; pharmacy; dentistry; and, behavioral or mental health.

Individual schools will be responsible for calculating their percentage of URM graduates with degrees. Schools' graduation rate percentages will be compared to the thresholds established through the methodology described above. If a school meets or exceeds the threshold, it will meet the graduation eligibility criterion for the COE program. To calculate their URM graduation percentage, health professions schools would:

1. Sum the appropriate URM (Hispanic, Native American, or ''Other'') population that completed and successfully graduated from the health professions school with degrees across the most recent three years (A).

2. Sum the total student population that completed and successfully graduated from the health professions school with degrees across the most recent three years (B).

3. Divide A by B to arrive at the average designated URM percentage of successful graduates from the health professions schools with degrees across the past three years.

To be eligible for the COE program, Hispanic, Native American and ''Other'' applicants must meet or exceed the proposed graduation thresholds. The proposed graduation threshold in each of the eligible fields of study is the 75th percentile of URM graduation rates as reported to the IPEDS. The 75th percentile was determined based on an analysis of the IPEDS Completions survey of 2009 data within the appropriate field of study, as defined by the Classification of Instructional Program (CIP) code system. The CIP is the accepted federal government statistical standard on instructional program classifications. The ''Total Programs'' per discipline represents the number of programs reporting a completions rate for the given CIP code in the U.S. within the IPEDS system.

Proposed Graduation Rate Eligibilty Thresholds

The analysis would be as follows:

Allopathic And Osteopathic Medicine Programs (Doctors of Medicine, Doctors of Osteopathy)

Total Programs Reported in IPEDS = 142.

Hispanic graduation rate eligibility threshold = 6.3 percent.

Native American graduation rate eligibility threshold = 1.0 percent.
''Other'' COE graduation rate eligibility threshold = 14.1 percent.

Dentistry (Doctors of Dental Surgery, Doctors of Dental Medicine)

Total Programs Reported in IPEDS = 59.
Hispanic graduation rate eligibility threshold = 7.1 percent.
Native American graduation rate eligibility threshold = 1.4 percent.
''Other'' COE graduation rate eligibility threshold = 13.5 percent.

Pharmacy (Doctor of Pharmacy)

Total Programs Reported in IPEDS = 94.
Hispanic graduation rate eligibility threshold = 3.5 percent.
Native American graduation rate eligibility threshold = 0.5 percent.*
Other COE graduation rate eligibility threshold = 10.0 percent.

Behavioral or Mental Health

Total Programs Reported in IPEDS = 1928.
Hispanic graduation rate eligibility threshold = 7.7 percent.
Native American graduation rate eligibility threshold = 0.66 percent.*
Other COE graduation rate eligibility threshold = 26.1 percent.

* Due to the limited number of Native Americans graduating with a Doctor of Pharmacy or a graduate degree in Behavioral or Mental Health from the school of discipline, the proposed graduation rate eligibility threshold for these two disciplines is based on the mean percentage and not on the 75 percentile of Native Americans graduating with the required degree.

C. Criterion three: The third criterion requires designated health professions schools to have effectively recruited URMs, including providing scholarships and other financial assistance for individuals enrolled in the school, and encouraging URM students from all levels of the education pipeline to pursue health professions careers. Such schools are responsible for establishing criteria for financial assistance, selecting recipients within the Centers of Excellence program, and making reasonable determinations of need for the level of financial assistance for the recipients. Each school will independently develop the criteria to receive financial assistance, submit this information in their application, where it collectively will be objectively reviewed by the peer review panel. The availability of financial assistance, as formulated by the health professions school, is designed to assist in increasing the level of URM health professionals who successfully complete the program, as well as increase their intent to practice in underserved areas.

D. Criterion four: The fourth criterion requires designated health professions schools to have made a significant recruitment effort to increase the number of URM individuals serving in faculty or administrative positions at the school. A major COE program focus is to improve the capacity of the school to train, recruit, and retain URM faculty and administrative personnel. A health professions school should demonstrate over a 5-year period a ''significant effort'' to recruit and retain URM faculty and administrative positions based on the number of URM faculty and new URM hires.

The catalog of Federal Domestic Assistance Number for the COE program is 93.157. This program is not subject to the provisions of Executive Order 12372, Intergovernmental Review of Federal Programs (as implemented through 45 CFR part 100). Further, these programs are not subject to the Public Health Systems Reporting Requirements. The Centers of Excellence Program application is approved under OMB No. 0915–0060.

Dated: November 1, 2011.

Mary K. Wakefield,

Administrator.

[FR Doc. 2011–28670 Filed 11–4–11; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2011–1014]

Information Collection Requests to Office of Management and Budget

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit Information Collection Requests (ICRs) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collections of information: 1625–0028, Course Approval and Records for Merchant Marine Training Schools and 1625–0069, Ballast Water Management for Vessels with Ballast Tanks Entering U.S. Waters. Our ICRs describe the information we seek to collect from the public. Before submitting these ICRs to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before January 6, 2012.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2011–1014] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT). To avoid duplicate submissions, please use only one of the following means:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.

(4) *Fax:* (202) 493–2251. To ensure your comments are received in a timely manner, mark the fax, to attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

Copies of the ICRs are available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–611), Attn Paperwork Reduction Act Manager, US Coast Guard, 2100 2nd St. SW Stop 7101, Washington DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Contact Ms. Kenlinishia Tyler, Office of Information Management, telephone (202) 475–3652, or fax (202) 475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, (202) 366–9826 for questions on the docket.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains

information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collections. There is one ICR for each Collection.

The Coast Guard invites comments on whether these ICRs should be granted based on the Collections being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collections; (2) the accuracy of the estimated burden of the Collections; (3) ways to enhance the quality, utility, and clarity of information subject to the Collections; and (4) ways to minimize the burden of the Collections on respondents, including the use of automated collection techniques or other forms of information technology. In response to your comments, we may revise these ICRs or decide not to seek approval for the Collections. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2011–1014], and must be received by January 6, 2012. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the ''Privacy Act'' paragraph below.

Submitting Comments

If you submit a comment, please include the docket number [USCG–2011–1014], indicate the specific section of the document to which each comment applies, providing a reason for each comment. You may submit your comments and material online (*via http://www.regulations.gov*), by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the DMF. We recommend you include your name, mailing address, an email address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

You may submit your comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. To submit your comment online, go to *http://www.regulations.gov,* and type ''USCG–2011–1014'' in the ''Keyword'' box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

Viewing comments and documents: To view comments, as well as documents mentioned in this Notice as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–1014'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the DMF in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review a Privacy Act statement regarding Coast Guard public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Information Collection Requests.

1. *Title:* Course Approval and Records for Merchant Marine Training Schools.

OMB Control Number: 1625–0028.

Summary: The information is needed to ensure that merchant marine training schools meet minimal statutory requirements. The information is used to approve the curriculum, facility and faculty for these schools.

Need: Section 7315 of 46 U.S.C. authorizes an applicant for a license or document to substitute the completion of an approved course for a portion of the required sea service. Section 10.302 of 46 CFR contains the Coast Guard regulations for course approval.

Forms: None.

Respondents: Merchant marine training schools.

Frequency: Five years for reporting; one year for recordkeeping.

Burden Estimate: The estimated burden remains 97,260 hours a year.

2. *Title:* Ballast Water Management for Vessels with Ballast Tanks Entering U.S. Waters.

OMB Control Number: 1625–0069.

Summary: This collection requires the master of a vessel to provide information that details the vessel operator's ballast water management efforts.

Need: The information is needed to ensure compliance with 16 U.S.C. 4711 and the requirements in 33 CFR part 151, subparts C and D regarding the management of ballast water, to prevent the introduction and spread of aquatic nuisance species into U.S. waters. The information is also used for research and periodic reporting to Congress.

Forms: CG–5662.

Respondents: Owners and operators of certain vessels.

Frequency: On occasion.

Burden Estimate: The estimated burden remains 60,727 hours a year.

Dated: October 31, 2011.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2011–28717 Filed 11–4–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5484–N–34]

Notice of Proposed Information Collection: Comment Request; FHA–Insured Mortgage Loan Servicing Involving the Claims and Conveyance Process, Property Inspection/ Preservation

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* January 6, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to

the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1 (800) 877–8339).

FOR FURTHER INFORMATION CONTACT: Henry S. Czauski, Acting Deputy Administrator, Office of Manufactured Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–6409 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Dispute Resolution Certification and Federal Manufactured Housing Dispute Resolution Information Form.

OMB Control Number, if applicable: 2502–0562.

Description of the need for the information and proposed use: 42 U.S.C. 5401–5426, amended on December 27, 2009, by the Manufactured Housing Improvement Act of 2000, Public Law 106–569, required HUD to establish a manufactured housing dispute resolution program for states that choose not to operate their own dispute resolution programs. In order for a state to operate its own dispute resolution program, it needs to certify that its program meets the requirements of 42 U.S.C. 5401–5426, and must recertify every three years. For persons to provide the federal manufactured housing dispute resolution program information to resolve the dispute, they need to submit information on the home and parties involved in the dispute.

Agency form numbers, if applicable: OMB 2502–0562.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 511. The number of respondents is 228, the number of responses is 228, the frequency of response is on occasion, and the burden hour per response is 1.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: October 31, 2011.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing.

[FR Doc. 2011–28679 Filed 11–4–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–108]

Notice of Submission of Proposed Information Collection to OMB Transformation Initiative: Choice Neighborhoods Demonstration, Small Grants Research Program

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The U.S. Department of the Housing and Urban Development (HUD) intends to make funding available from the FY 2012 Transformation Initiative for Research Grants related to the Choice Neighborhoods Demonstration. This information collection is for applications for funding, and reporting requirements for funded applications.

DATES: *Comments Due Date:* December 7, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2528-Pending) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; *fax:* (202) 395–5806. *Email: OIRA_Submission@omb.eop.gov fax:* (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email Colette Pollard at Colette. *Pollard@hud.gov.* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Transformation Initiative: Choice Neighborhoods Demonstration, Small Grants Research Program.

OMB Approval Number: 2528-Pending.

Form Numbers: SF–424, HUD–2993, HUD–96011, SF–LLL, HUD 424–CB, and SF–LLL, and HUD–2880.

Description of the Need for the Information and Its Proposed Use: The U.S. Department of the Housing and Urban Development (HUD) intends to make funding available from the FY 2012 Transformation Initiative for Research Grants related to the Choice Neighborhoods Demonstration. This information collection is for applications for funding, and reporting requirements for funded applications.

Frequency of Submission: Annually.

	Number of respondents	Annual responses	×	Hours per response	Burden hours
Reporting Burden	20	2.5		19.4	970

Total Estimated Burden Hours: 970.
Status: New collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: November 1, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–28781 Filed 11–4–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Renewal of Information Collection for Source Directory Publication

AGENCY: Indian Arts and Crafts Board, Interior.

ACTION: Notice and request for comments.

SUMMARY: The Indian Arts and Crafts Board (IACB) collects information to identify and revise listings for the *Source Directory of American Indian and Alaska Native Owned and Operated Arts and Crafts Businesses* (*Source Directory*). In compliance with the Paperwork Reduction Act of 1995, the IACB has submitted a request for renewal of approval of this information collection to the Office of Management and Budget (OMB), and requests public comments on this submission.

DATES: OMB has up to 60 days to approve or disapprove the information collection request, but may respond after 30 days; therefore, public comments should be submitted to OMB by December 7, 2011, in order to be assured of consideration.

ADDRESSES: Send your written comments by facsimile (202) 395–5806 or email *(OIRA_DOCKET@omb.eop.gov)* to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Department of the Interior Desk Officer (1085–0001). Also, please send a copy of your comments to Meridith Z. Stanton, Indian Arts and Crafts Board, U.S. Department of the Interior, MS 2528–MIB, 1849 C Street NW., Washington, DC 20240. If you wish to submit comments by facsimile, the number is (202) 208–5196, or by email to *iacb@ios.doi.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the *Source Directory* application or renewal forms, i.e., the information collection instruments, should be directed to Meridith Z. Stanton, Director, Indian Arts and Crafts Board, 1849 C Street NW., MS 2528–MIB, Washington, DC 20240. You may also request additional information by telephone (202) 208–3773 (not a toll free call), or by email to *(iacb@ios.doi.gov)* or by facsimile to (202) 208–5196. You may also review the information collection request online at *http://www.reginfo.gov/public/do/PRAMain*.

SUPPLEMENTARY INFORMATION:

I. Abstract

The *Source Directory* of American Indian and Alaska Native owned and operated arts and crafts enterprises is a program of the Indian Arts and Crafts Board that promotes American Indian and Alaska Native arts and crafts. The *Source Directory* is a listing of American Indian and Alaska Native owned and operated arts and crafts businesses that may be accessed by the public on the Indian Arts and Crafts Board's Web site *http://www.iacb.doi.gov*.

The service of being listed in this directory is provided free-of-charge to members of federally recognized tribes. Businesses listed in the *Source Directory* include American Indian and Alaska Native artists and craftspeople, cooperatives, tribal arts and crafts enterprises, businesses privately-owned-and-operated by American Indian and Alaska Native artists, designers, and craftspeople, and businesses privately owned-and-operated by American Indian and Alaska Native merchants who retail and/or wholesale authentic Indian and Alaska Native arts and crafts. Business listings in the *Source Directory* are arranged alphabetically by State.

The Director of the Board uses this information to determine whether an individual or business applying to be listed in the *Source Directory* meets the requirements for listing. The approved application will be printed in the *Source Directory.* The *Source Directory* is updated as needed to include new businesses and to update existing information.

II. Method of Collection

To be listed in the *Source Directory,* interested individuals and businesses must submit: (1) A draft of their business information in a format like the other *Source Directory* listings, (2) a copy of the individual's or business owner's tribal enrollment card; and for businesses, proof that the business is organized under tribal, state, or federal law; and (3) a certification that the business is an American Indian or Alaska Native owned and operated cooperative, tribal enterprise, or nonprofit organization, or that the owner of the enterprise is an enrolled member of a federally recognized American Indian Tribe or Alaska Native group.

The following information is collected in a single-page form that is distributed by the Indian Arts and Crafts Board. Although listing in the *Source Directory* is voluntary, submission of this information is required for inclusion in the *Directory.*

Information collected	Reason for collection
Name of business, mailing address, city, zip code (highway location, Indian reservation, etc.), telephone number and email address.	To identify the business to be listed in the *Source Directory,* and method of contact.
Type of organization	To identify the nature of the business entity.
Hours/season of operation	To identify those days and times when customers may contact the business.
Internet Web site address	To identify whether the business advertises and/or sells inventory online.
Main categories of products	To identify the products that the business produces.
Retail or wholesale products	To identify whether the business is a retail or wholesale business.
Mail order and/or catalog	To identify whether the business has a mail order and/or catalog.
Price list information, if applicable	To identify the cost of the listed products.

Information collected	Reason for collection
For a cooperative or tribal enterprise, a copy of documents showing that the organization is formally organized under tribal, state or federal law.	To determine whether the business meets the eligibility requirement for listing in the Source Directory.
Signed certification that the business is an American Indian or Alaska Native owned and operated cooperative, tribal enterprise, or nonprofit organization.	To obtain verification that the business is an American Indian or Alaska Native owned and operated business.
Copy of the business owner's tribal enrollment card	To determine whether the business owner is an enrolled member of a federally recognized tribe.
Signed certification that the owner of the business is a member of a federally recognized tribe.	To obtain verification that the business owner is an enrolled member of a federally recognized tribe.

The proposed use of the information: The information collected will be used by the Indian Arts and Crafts Board:

(a) To determine whether an individual or business meets the eligibility requirements for inclusion in the *Source Directory,* i.e., whether they are either an American Indian or Alaska Native owned and operated cooperative, tribal enterprise, or nonprofit organization, or an enrolled member of a federally recognized American Indian Tribe or Alaska Native group; and

(b) to identify the applicant's business information to be printed in the *Source Directory.*

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number. The IACB has submitted a request to OMB to renew its approval of this information collection for an additional three years. There are four types of application forms: (1) New businesses—group; (2) new businesses—individual; (3) businesses already listed—group; and (4) businesses already listed—individual. Each respondent will only be asked to complete one application form.

As required under 5 CFR 1320.8(d), a **Federal Register** notice soliciting comments on the collection of information was published on June 17, 2011 (76 FR 35462). No comments were received. This notice provides the public with an additional 30 days in which to comment on the following information collection activity.

III. Data

(1) *Title: Source Directory* of American Indian and Alaska Native owned businesses.

OMB Control Number: 1085–0001.

Type of Review: Renewal of an existing collection.

Affected Entities: American Indian owned or operated arts and crafts businesses.

Estimated annual number of respondents: 100.

Frequency of response: As needed.

(2) Annual reporting and recordkeeping burden.

Total Annual Reporting per Respondent: 15 minutes.

Total Annual Burden Hours: 25 hours.

(3) Description of the need and use of the information: Submission of this information is required to receive the benefit of being listed in the Indian Arts and Crafts Board *Source Directory.* The information is collected to determine the applicant's eligibility for the service and to obtain the applicant's name and business address to be added to the online directory.

IV. Request for Comments

The Department of the Interior invites comments on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden of the collection and the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other collection techniques or other forms of information technology.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Dated: November 1, 2011.

Meridith Z. Stanton,

Director, Indian Arts and Crafts Board.

[FR Doc. 2011–28714 Filed 11–4–11; 8:45 am]

BILLING CODE 4310–4H–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Invasive Species Advisory Committee

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of public meetings of the Invasive Species Advisory Committee.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act, notice is hereby given of meetings of the Invasive Species Advisory Committee (ISAC). Comprised of 29 nonfederal invasive species experts and stakeholders from across the nation, the purpose of the Advisory Committee is to provide advice to the National Invasive Species Council, as authorized by Executive Order 13112, on a broad array of issues related to preventing the introduction of invasive species and providing for their control and minimizing the economic, ecological, and human health impacts that invasive species cause. The Council is co-chaired by the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce. The duty of the Council is to provide national leadership regarding invasive species issues.

Purpose of Meeting: The meeting will be held on December 6–8, 2011 in Washington, DC and will focus primarily invasive species as it relates to commerce. The purpose of the meeting is to convene the full ISAC and consider strategies and methodologies for implementing performance elements outlined in the 2008–2012 Invasive Species National Management Plan. The meeting is open to the public. An orientation session will be held on Monday, December 5, 2011, for the six new ISAC members appointed by

Secretary Ken Salazar on September 16, 2011. There will be no ISAC business conducted during the orientation session, which is closed to the public.

DATES: ISAC New Member Orientation (CLOSED): Monday, December 5, 2011; 9 a.m.–1:45 p.m. Meeting of the Invasive Species Advisory Committee (OPEN): Tuesday, December 6, 2011 through Thursday, December 8, 2011. The meeting will be held 8 a.m. to 5 p.m. on Tuesday, December 6, 2011 and Wednesday, December 7, 2011. On Thursday, December 8, 2011, the meeting will begin at 8 a.m., and adjourn at 12 noon.

ADDRESSES: The new member orientation will be held at the NISC offices at 1201 Eye Street NW., Washington, DC 20005. The ISAC meeting will be held at the U.S. Department of Commerce (Herbert C. Hoover Building), 1401 Constitution Avenue NW., Washington, DC 20230. The general session will be held in Room 4830. *Note:* All meeting participants and interested members of the public must be cleared through building security prior to being escorted to the meeting.

FOR FURTHER INFORMATION CONTACT: Kelsey Brantley, National Invasive Species Council Program Specialist and ISAC Coordinator, (202) 513–7243; *Fax:* (202) 371–1751,

Dated: October 31, 2011.

Lori Williams,

Executive Director, National Invasive Species Council.

[FR Doc. 2011–28743 Filed 11–4–11; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R7–FHC–2011–N188; FF07CAMM00–FXFR13370700000L5–123]

Letters of Authorization To Take Marine Mammals

AGENCY: Fish and Wildlife Service, Department of the Interior.

ACTION: Notice of issuance.

SUMMARY: In accordance with the Marine Mammal Protection Act of 1972, as amended (MMPA), we, the Fish and Wildlife Service, have issued letters of authorization for the nonlethal take of polar bears and Pacific walrus incidental to oil and gas industry exploration, development, and production activities in the Beaufort Sea and the adjacent northern coast of Alaska and incidental to oil and gas industry exploration activities in the Chukchi Sea and the adjacent western coast of Alaska.

FOR FURTHER INFORMATION CONTACT: Craig Perham at the Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, Anchorage, AK 99503; (800) 362–5148 or (907) 786–3810.

SUPPLEMENTARY INFORMATION: On August 2, 2006, we published in the **Federal Register** a final rule (71 FR 43926) establishing regulations that allow us to authorize the nonlethal, incidental, unintentional take of small numbers of polar bears and Pacific walrus during year-round oil and gas industry exploration, development, and production activities in the Beaufort Sea and adjacent northern coast of Alaska. The rule established subpart J in part 18 of title 50 of the Code of Federal Regulations (CFR) and was effective until August 2, 2011. New regulations were issued on August 3, 2011 (76 FR 47010), effective through August 3, 2016. The rule prescribed a process under which we issue Letters of Authorization (LOAs) to applicants conducting activities as described under the provisions of the regulations. In accordance with section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) and our regulations at 50 CFR 18, subpart J, we issued an LOA to each of the following companies in the Beaufort Sea and adjacent northern coast of Alaska:

BEAUFORT SEA LETTERS OF AUTHORIZATION

Company	Activity	Project	Date issued
BP Exploration Alaska, Inc	Development	Liberty Development Project	January 20, 2011.
BP Exploration Alaska, Inc	Development	Red Dog #1 Plug and Abandonment Project	January 20, 2011.
Brooks Range Petroleum Corporation.	Exploration	North Tarn Exploration Program	January 1, 2011.
Brooks Range Petroleum Corporation.	Exploration	North Tarn Summer Clean Up and Field Studies	July 22, 2011.
ConocoPhillips Alaska, Inc	Exploration	Hydrate Production Test, Ignik Sikumi I, Prudhoe Bay Unit.	January 3, 2011.
ConocoPhillips Alaska, Inc	Exploration	West Kuparuk 3D Seismic Exploration Program	January 3, 2011.
ConocoPhillips Alaska, Inc	Development	Puviaq #1 Plug and Abandonment Program	January 10, 2011.
Eni US Operating Co., Inc	Development	Nikaitchuq Development Program	May 15, 2011.
ExxonMobil Production Company.	Development	Point Thomson	February 1, 2011.
ExxonMobil Production Company.	Exploration	Seafloor Sediment Sampling Program	July 11, 2011.
FEX L.P	Development	Plug and Abandonment Project, Aklaqyaaq #1, Aklaq #2, and Aklaq #6 Wells.	January 10, 2011.
Marsh Creek, LLC	Development	Corrective Action Activities, Umiat Test Well No. 9	February 11, 2011.
North Slope Borough	Development	Gas Fields Well Drilling Program	April 15, 2011.
Olgoonik Fairweather, LLC	Exploration	Beaufort Sea Acoustic Monitoring Recorder Deployment and Retrieval Project.	July 15, 2011.
Olgoonik Fairweather, LLC	Exploration	Central Beaufort Sea Fisheries Cruise Environmental Studies Program.	July 15, 2011.
Pioneer Natural Resources Alaska, Inc.	Development	Nuna Pre-Development Project	April 15, 2011.
Savant Alaska, LLC	Development	Badami Unit Redevelopment Project	February 7, 2011.
Shell Offshore, Inc	Development	Beaufort Sea Ice Observation and On-Ice Argos Data Buoy Deployment Program.	January 10, 2011.
Shell Offshore, Inc	Exploration	Beaufort Sea Open Water Marine Survey Program and Onshore Environmental Baseline Study Activities.	June 10, 2011.

On June 11, 2008, we published in the **Federal Register** a final rule (73 FR 33212) establishing regulations that allow us to authorize the nonlethal, incidental, unintentional take of small numbers of polar bears and Pacific walrus during year-round oil and gas industry exploration activities in the Chukchi Sea and adjacent western coast of Alaska. The rule established subpart I of 50 CFR part 18 and is effective until June 11, 2013. The rule prescribed a process under which we issue LOAs to applicants conducting activities as described under the provisions of the regulations. In accordance with section 101(a)(5)(A) of the MMPA and our regulations at 50 CFR 18, subpart I, we issued an LOA to the following companies in the Chukchi Sea:

CHUKCHI SEA LETTERS OF AUTHORIZATION

Company	Activity	Project	Date issued
Shell Offshore, Inc	Exploration	Chukchi Sea Ice Observation Flights Program	January 10, 2011.
Shell Offshore, Inc	Exploration	Chukchi Sea Coastal Marine and Onshore Environmental Baseline Study.	May 15, 2011.
Shell Offshore, Inc	Exploration	Chukchi Sea Baseline Environmental Studies Program	July 29, 2011.
Statoil USA E&P, Inc	Exploration	Chukchi Sea Shallow Hazards Survey Project	June 20, 2011.

Dated: October 5, 2011.

E. LaVerne Smith,

Acting Regional Director, Alaska Region.

[FR Doc. 2011–28739 Filed 11–4–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2011–0087; 96300–1671–0000 FY12–R4]

Request for Information and Recommendations on Resolutions, Decisions, and Agenda Items for Consideration at the Sixteenth Regular Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: To implement the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES or the Convention), the Parties to the Convention meet periodically to review what species in international trade should be regulated and other aspects of the implementation of CITES. The sixteenth regular meeting of the Conference of the Parties to CITES (CoP16) is tentatively scheduled to be held in March 2013 in Thailand. This is our second in a series of **Federal Register** notices that, together with an announced public meeting, provide you with an opportunity to participate in the development of the U.S. negotiating positions for CoP16. We published our first CoP16-related **Federal Register** notice on June 14, 2011, in which we requested information and recommendations on species proposals for the United States to consider submitting for consideration at CoP16. Further input from the public on species proposals will be sought in a future notice. With this notice we are soliciting and invite you to provide us with information and recommendations on resolutions, decisions, and agenda items that the United States might consider submitting for discussion at CoP16. In addition, with this notice we provide preliminary information on how to request approved observer status for nongovernmental organizations that wish to attend the meeting.

DATES: We will consider all information and comments we receive on or before January 6, 2012.

ADDRESSES: You may submit comments pertaining to recommendations for resolutions, decisions, and agenda items for discussion at CoP16 by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–R9–IA–2011–0087.
- *U.S. mail or hand-delivery:* Public Comments Processing, *Attn:* FWS–R9–IA–2011–0087; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will not consider comments sent by email or fax or to an address not listed in the **ADDRESSES** section. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us. If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Comments and materials we receive in response to this notice will be available for public inspection on *http://www.regulations.gov,* or by appointment, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays, at the U.S. Fish and Wildlife Service, Division of Management Authority, 4401 N. Fairfax Drive, Room 212, Arlington, VA 22203; telephone (703) 358–1908.

FOR FURTHER INFORMATION CONTACT: For information pertaining to resolutions, decisions, and agenda items contact: Robert R. Gabel, Chief, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 212, Arlington, VA 22203; telephone (703) 358–2095; facsimile (703) 358–2298. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at (800) 877–8339. For information pertaining to species proposals contact: Rosemarie Gnam, Chief, Division of Scientific Authority, phone (703) 358–1708, fax (703) 358–2276, email: *scientificauthority@fws.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Convention on International Trade in Endangered Species of Wild Fauna and Flora, hereinafter referred to as CITES or the Convention, is an international treaty designed to regulate international trade in certain animal and plant species that are now, or potentially may become, threatened with extinction. These species are listed in the Appendices to CITES, which are available on the CITES Secretariat's Web site at *http://www.cites.org/eng/app/index.shtml.*

Currently, 175 countries, including the United States, are Parties to CITES. The Convention calls for regular biennial meetings of the Conference of the Parties, unless the Conference

decides otherwise. At these meetings, the Parties review the implementation of CITES, make provisions enabling the CITES Secretariat in Switzerland to carry out its functions, consider amendments to the list of species in Appendices I and II, consider reports presented by the Secretariat, and make recommendations for the improved effectiveness of CITES. Any country that is a Party to CITES may propose amendments to Appendices I and II, resolutions, decisions, and agenda items for consideration by all the Parties at the meeting.

This is our second in a series of **Federal Register** notices that, together with an announced public meeting, provide you with an opportunity to participate in the development of the U.S. submissions to and negotiating positions for the sixteenth regular meeting of the Conference of the Parties to CITES (CoP16). We published our first CoP16-related **Federal Register** notice on June 14, 2011 (76 FR 34746), in which we requested information and recommendations on species proposals for the United States to consider submitting for consideration at CoP16. With today's notice, we had intended to announce tentative species proposals that the United States is considering submitting for CoP16 and solicit further information and comments on them. However, we have not completed our assessment of the information received in response to our request for information and recommendations on species proposals for the United States to consider submitting for consideration at CoP16. We intend to announce tentative species proposals that the United States is considering submitting for CoP16 and solicit further information and comments on them when we publish our next CoP16-related **Federal Register** notice. You may obtain information on species proposals by contacting the Division of Scientific Authority at the telephone number or email address provided in ''**FOR FURTHER INFORMATION CONTACT**'' above. Our regulations governing this public process are found in title 50 of the Code of Federal Regulations (CFR) at 23.87.

CoP16 is tentatively scheduled to be held in Thailand in March 2013.

U.S. Approach for CoP16

We published our first CoP16-related **Federal Register** notice on June 14, 2011 (76 FR 34746) and described our approach for species proposals for the United States to consider submitting at CoP16. Priorities for U.S. submissions to CoP16 continue to be consistent with the overall objective of U.S. participation in the Convention: To maximize the effectiveness of the Convention in the conservation and sustainable use of species subject to international trade. With this in mind, we plan to consider the following factors when considering recommendations for resolutions, decisions, and agenda items for discussion at CoP16:

(1) *Does the proposed action address difficulties in implementing or interpreting the Convention by the United States as an importing or exporting country, and would the proposed action contribute to the effective implementation of the Convention by all Parties?* Differences in interpretation of the Convention by 175 Party nations can result in inconsistencies in the way it is implemented. In addition, wildlife trade is dynamic and ever-changing, thus presenting problems when established procedures are not readily applicable to new situations. The United States experiences some of these problems and inconsistencies directly through its own imports and exports, but we also learn of these difficulties through our participation in various fora, such as the CITES Standing Committee and technical committees, and through discussions with other countries, nongovernmental organizations, and the CITES Secretariat. When the United States cannot resolve these difficulties unilaterally or through bilateral discussions with trading partners, we may propose resolutions or decisions, usually in collaboration with other Parties, or have these topics included in the agenda of the meeting of the Conference of the Parties for discussion by all of the Parties.

(2) *Does the proposed action improve implementation of the Convention by increasing the quality of information and expertise used to support decisions by the Parties?* With increased complexity, sophistication, and specialization in the biological sciences and other disciplines, it is critical that the CITES Parties have the best available information upon which to base decisions that affect the conservation of wildlife resources. Where appropriate, the United States will recommend actions to ensure the availability of up-to-date and accurate information to the Parties, including through the establishment of relationships with relevant international bodies, including other conventions, interjurisdictional resource management agencies, and international nongovernmental organizations with relevant expertise.

Request for Information and Recommendations on Resolutions, Decisions, and Agenda Items

Although we have not yet received formal notice of the provisional agenda for CoP16, we invite your input on possible agenda items that the United States could recommend for inclusion, or on possible resolutions and decisions of the Conference of the Parties that the United States could submit for consideration. Copies of the agenda and the results of the last meeting of the Conference of the Parties (CoP15) in Doha, Qatar, in March 2010, as well as copies of all resolutions and decisions of the Conference of the Parties currently in effect, are available on the CITES Secretariat's Web site (*http://www.cites.org/*) or from the Division of Management Authority at the above address.

Observers

Article XI, paragraph 7 of CITES provides: ''Any body or agency technically qualified in protection, conservation or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one-third of the Parties present object:

(a) International agencies or bodies, either governmental or nongovernmental, and national governmental agencies and bodies; and

(b) National nongovernmental agencies or bodies which have been approved or this purpose by the State in which they are located.

Once admitted, these observers shall have the right to participate but not to vote.''

National agencies or organizations within the United States must obtain our approval to participate in CoP16, whereas international agencies or organizations must obtain approval directly from the CITES Secretariat. We will publish information in a future **Federal Register** notice on how to request approved observer status. A factsheet on the process is posted on our Web site at: *http://www.fws.gov/international/pdf/ob.pdf.*

Future Actions

As stated above, the next regular meeting of the Conference of the Parties (CoP16) is tentatively scheduled to be held in Thailand in March 2013. The United States must submit any proposals to amend Appendix I or II, or any draft resolutions, decisions, or agenda items for discussion at CoP16, to

the CITES Secretariat 150 days (tentatively early October 2012) prior to the start of the meeting. In order to meet this deadline and to prepare for CoP16, we have developed a tentative U.S. schedule. When we publish our next CoP16-related **Federal Register** notice, we intend to announce tentative species proposals that the United States is considering submitting for CoP16 and solicit further information and comments on them. Following publication of that **Federal Register** notice and approximately 9 months prior to CoP16, we plan to publish a **Federal Register** notice announcing draft resolutions, draft decisions, and agenda items to be submitted by the United States at CoP16, and to solicit further information and comments on them. Approximately 4 months prior to CoP16, we will post on our Web site an announcement of the species proposals, draft resolutions, draft decisions, and agenda items submitted by the United States to the CITES Secretariat for consideration at CoP16.

Through a series of additional notices and Web site postings in advance of CoP16, we will inform you about preliminary negotiating positions on resolutions, decisions, and amendments to the Appendices proposed by other Parties for consideration at CoP16, and about how to obtain observer status from us. We will also publish an announcement of a public meeting tentatively to be held approximately 3 months prior to CoP16; that meeting will enable us to receive public input on our positions regarding CoP16 issues. The procedures for developing U.S. documents and negotiating positions for a meeting of the Conference of the Parties to CITES are outlined in 50 CFR 23.87. As noted in paragraph (c) of that section, we may modify or suspend the procedures outlined there if they would interfere with the timely or appropriate development of documents for submission to the CoP and of U.S. negotiating positions.

Author

The primary author of this notice is Clifton A. Horton, Division of Management Authority, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: October 19, 2011.

Hannibal Bolton,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2011–28735 Filed 11–4–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO320000 L13100000 PP0000 LXSIOSHL0000]

Renewal of Approved Information Collection, OMB Control Number 1004–0201

AGENCY: Bureau of Land Management, Interior.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Bureau of Land Management (BLM) has submitted an information collection request to the Office of Management and Budget (OMB) for a 3-year renewal of OMB control number 1004–0201, which pertains to management of oil shale on public lands.

DATES: The OMB is required to respond to this information collection request within 60 days but may respond after 30 days. Therefore, written comments should be received on or before December 7, 2011.

ADDRESSES: Please submit comments directly to the Desk Officer for the Department of the Interior (OMB #1004–0201), Office of Management and Budget, Office of Information and Regulatory Affairs, fax (202) 395–5806, or by electronic mail at *oira_docket@omb.eop.gov.* Please provide a copy of your comments to the BLM. You may do so via mail, fax, or electronic mail.

Mail: U.S. Department of the Interior, Bureau of Land Management, 1849 C Street NW., Room 2134LM, Attention: Jean Sonneman, Washington, DC 20240.

Fax: Jean Sonneman at fax number (202) 245–0050.

Electronic mail: jean_sonneman@blm.gov.

FOR FURTHER INFORMATION CONTACT: Mavis Love at (307) 775–6258. Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service at 1–(800) 877–8339, to contact Ms. Love. You may also review the information collection request online at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act (44 U.S.C. 3501–3521) and OMB regulations at 5 CFR part 1320 provide that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond. 44 U.S.C. 3506 and 3507. In order to obtain or renew an OMB control number, Federal agencies are required to seek public comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d) and 1320.12(a)).

As required at 5 CFR 1320.8(d), the BLM published a 60-day notice in the **Federal Register** on July 26, 2011 (76 FR 44600), soliciting comments from the public and other interested parties. The comment period closed on September 26, 2011. The BLM received no comments. The BLM now requests comments on the following subjects:

1. Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;

2. The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;

3. The quality, utility and clarity of the information to be collected; and

4. How to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other forms of information technology.

Please send comments as directed under **ADDRESSES** and **DATES**. Please refer to OMB control number 1004–0201 in your correspondence. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

The following information is provided for the information collection:

Title: Oil Shale Management (43 CFR Parts 3900, 3910, 3920, and 3930).

Form: Under 43 CFR 3904.12, bonds must be filed on an approved BLM form. However, the BLM has not yet developed the form.

OMB Control Number: 1004–0201.

Abstract: Section 369 of the Energy Policy Act (codified at 42 U.S.C. 15927 and amendments to 30 U.S.C. 241) authorizes the BLM to collect information from applicants for oil shale

leases, oil shale lessees, and operators. This collection enables the BLM to:

(1) Learn the extent and qualities of the public oil shale resource;

(2) Evaluate the environmental impacts of oil shale leasing and development;

(3) Determine the qualifications of prospective lessees to acquire and hold Federal oil shale leases;

(4) Administer statutes applicable to oil shale mining, production, resource recovery and protection, operations under oil shale leases, and exploration under leases and licenses;

(5) Ensure lessee compliance with applicable statutes, regulations, and lease terms and conditions; and

(6) Ensure that accurate records are kept of all Federal oil shale produced.

Frequency: On occasion.

Description of Respondents: Applicants for oil shale leases, oil shale lessees, and operators.

Estimated Reporting and Recordkeeping ''Hour'' Burden: 24 responses and 1,795 hours annually. The following table details the individual components and respective hour burdens of this information collection request:

A. Type of response	B. Number of responses	C. Hours per response	D. Total hours (B × C)
Application for Waiver, Suspension, or Reduction of Rental or Payment In Lieu of Production; Application for Reduction in Royalty; or Application for Waiver of Royalty			
43 CFR 3903.54(b)	1	1	1
Bonding Requirements			
43 CFR subpart 3904	1	1	1
Application for an Exploration License			
43 CFR 3910.31(a) through (e)	1	24	24
Notice Seeking Participation in an Exploration License			
43 CFR 3910.31(f)	1	1	1
Data Obtained Under an Exploration License			
43 CFR 3910.44	1	8	8
Response to Call for Expression of Leasing Interest			
43 CFR 3921.30	1	4	4
Application for a Lease—Individuals			
43 CFR 3902.23, 3922.20, and 3922.30	1	308	308
Application for a Lease—Associations			
43 CFR 3902.24, 3922.20, and 3922.30	1	308	308
Application for a Lease—Corporations			
43 CFR 3902.25, 3922.20, and 3922.30	1	308	308
Sealed Bid			
43 CFR 3924.10	1	8	8
Application to Convert Research, Development, and Demonstration Lease to Commercial Lease			
43 CFR 3926.10(c)	1	308	308
Drill and Geophysical Logs			
43 CFR 3930.11(b)	1	19	19
New Geologic Information			
43 CFR 3930.20(b)	1	19	19
Plan of Development			
43 CFR 3931.11	1	308	308
Application for Suspension of Lease Operations and Production			
43 CFR 3931.30	1	24	24
Exploration Plan			
43 CFR 3931.41	1	24	24
Modification of Approved Exploration Plan or Plan of Development			
43 CFR 3931.50	1	24	24
Production Maps and Production Reports			
43 CFR 3931.70	1	16	16
Records of Core or Test Hole Samples and Cuttings			
43 CFR 3931.80	1	16	16
Application for Modification of Lease Size			
43 CFR 3932.10, 3930.20, and 3932.30	1	12	12
Request for Approval of Assignment of Record Title or Sublease or Notice of Overriding Royalty Interest Assignment			
43 CFR Subpart 3933	2	10	20
Relinquishment of Lease or Exploration License			
43 CFR 3934.10	1	18	18
Production and Sale Records			
43 CFR 3935.10	1	16	16
Totals	24	.....	1,795

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: Fixed fees in the amount of $420 and case-by-case cost-recovery fees in the amount of $526,177.

Jean Sonneman,

Bureau of Land Management, Information Collection Clearance Officer.

[FR Doc. 2011–28750 Filed 11–4–11; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNV952000 L14200000.BJ0000 241A; 12–08807; MO# 4500027443; TAS:14X1109]

Filing of Plats of Survey; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public and interested State and local government officials of the filing of Plats of Survey in Nevada.

DATES: *Effective Dates:* Filing is effective at 10 a.m. on the dates indicated below.

FOR FURTHER INFORMATION CONTACT: David D. Morlan, Chief, Branch of Geographic Sciences, Bureau of Land Management, Nevada State Office, 1340 Financial Blvd., Reno, NV 89520, *phone:* (775) 861–6541. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

1. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on July 8, 2011: The plat, representing the dependent resurvey of a portion of the subdivisional lines and the southerly right-of-way line of Interstate Highway No. 15 through section 30, and a metes-and-bounds survey in sections 30 and 31, Township 13 South, Range 69 East, Mount Diablo Meridian, Nevada, under Group No. 890, was accepted on July 6, 2011.

The plat, representing the dependent resurvey of portions of the north and west boundaries and a portion of the subdivisional lines, and a metes-and-bounds survey in sections 5, 6 and 7, Township 14 South, Range 69 East, Mount Diablo Meridian, under Group No. 890, was accepted on July 6, 2011. These surveys were executed to meet certain administrative needs of the City of Mesquite and the Bureau of Land Management.

2. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on September 15, 2011: The plat, in two sheets, represents the dependent resurvey of a portion of the west boundary, the north boundary, and a portion of the subdivisional lines, and the subdivision of certain sections, Township 15 South, Range 67 East, Mount Diablo Meridian, Nevada, under Group No. 841, was accepted on September 13, 2011. This survey was executed to meet certain administrative needs of the Bureau of Land Management. The above-listed surveys are now the basic record for describing the lands for all authorized purposes. These surveys have been placed in the open files in the Bureau of Land Management, Nevada State Office and are available to the public as a matter of information. Copies of the surveys and related field notes may be furnished to the public upon payment of the appropriate fees.

Dated: October 24, 2011.

David D. Morlan,

Chief Cadastral Surveyor, Nevada.

[FR Doc. 2011–28695 Filed 11–4–11; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY910000 L16100000.XX0000]

Call for Nominations for the Wyoming Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to request public nominations to fill three positions for the Bureau of Land Management's (BLM) Wyoming's 10-member Resource Advisory Council (RAC). The RAC provides advice and recommendations to the BLM on land use planning and management of the National System of Public Lands within the State of Wyoming.

DATES: All nominations must be received no later than December 22, 2011.

ADDRESSES: Nominations should be sent to Ms. Cindy Wertz, Wyoming State Office, Bureau of Land Management, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, WY 82003.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Wertz, Wyoming State Office, Bureau of Land Management, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, WY 82003; (307) 775–6014; or email *Cindy_Wertz@blm.gov.*

SUPPLEMENTARY INFORMATION: The Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1739) directs the Secretary of the Interior to involve the public in planning and issues related to management of lands administered by the Bureau of Land Management (BLM). Section 309 of FLPMA directs the Secretary to establish 10- to 15-member citizen-based advisory councils that are consistent with the Federal Advisory Committee Act (FACA). As required by FACA, RAC membership must be balanced and representative of the various interests concerned with the management of the public lands.

The RAC has one vacancy in category one (holders of Federal grazing permits and representatives of organizations associated with energy and mineral development, timber industry, transportation or rights-of-way, developed outdoor recreation, off-highway vehicle use, and commercial recreation), one vacancy in category two (representatives of nationally or regionally recognized environmental organizations; archaeological and historic organizations, dispersed recreation activities, and wild horse and burro organizations), and one vacancy in category three (representatives of state, county, or local elected office; employees of a state agency responsible for management of natural resources; representatives of Indian tribes within or adjacent to the area for which the council is organized; representatives of academia who are employed in natural sciences; or the public-at-large). Upon appointment, the individuals selected will fill the position until January 12, 2015. Nominees must be residents of Wyoming. BLM will evaluate nominees based on their education, training, experience, and their knowledge of the geographical area. Nominees should demonstrate a commitment to collaborative resource decision making. The Obama Administration prohibits individuals who are currently federally registered lobbyists to serve on all FACA and non-FACA boards, committees, or councils. The following must accompany all nominations:

—Letters of reference from represented interest or organizations;

—A completed background information nomination form; and

—Any other information that addresses the nominee's qualifications.

You may download nomination forms from the following Web site: *http://www.blm.gov/wy/st/en/advcom/rac.html.*

Certification Statement: I hereby certify that the BLM Wyoming Resource Advisory Council is necessary and in the public interest in connection with the Secretary's responsibilities to manage the lands, resources, and facilities administered by the BLM.

Donald A. Simpson,

State Director.

[FR Doc. 2011–28708 Filed 11–4–11; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAK–963000–L1410000–KB0000; AA–40482]

Order Providing for Opening of Lands Subject to Section 24 of the Federal Power Act; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This notice opens lands for selection by the State of Alaska (State), subject to Section 24 of the Federal Power Act (FPA). The lands include approximately 1,355 acres of National Forest System lands withdrawn for Power Site Classification No. 221 by the Secretarial Order dated May 14, 1929, and approximately 948 acres of public land withdrawn for the Federal Energy Regulatory Commission (FERC) Power Project No. 13234. This action will permit conveyance of the land to the State, if such land is otherwise available, and retain the power rights to the United States. Any land described herein that is not conveyed to the State will remain subject to the terms and conditions of the Tongass National Forest reservation and any other withdrawal of record.

DATES: *Effective Date:* November 7, 2011.

FOR FURTHER INFORMATION CONTACT: Robert L. Lloyd, Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513; (907) 271–4682. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The State has requested the land withdrawn for Power Site Classification No. 221, and FERC Power Project No. 13234, to be opened to State selection subject to Section 24 of the FPA. Upon publication of this notice, the land will be made available for conveyance to the State pursuant to Section 6(a) of the Alaska Statehood Act of July 7, 1958, 48 U.S.C. note prec. 21 and Section 906(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. 1635(e).

By virtue of the authority vested in the Secretary of the Interior by Section 24 of the FPA of June 10, 1920, as amended, 16 U.S.C. 818, and pursuant to the determination by the FERC in DVAK–130–001, and according to the regulations under 43 CFR 2091.5–4(b), notice is hereby given that:

1. Subject to valid existing rights at 10 a.m. Alaska Time on November 7, 2011, the following described National Forest System land is hereby opened for selection by the State under the Alaska Statehood Act of July 7, 1958, 48 U.S.C. note prec. 21, subject to the provisions of Section 24 of the FPA as specified by the FERC in determination DVAK–130–001, to permit conveyance to the State, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law:

Copper River Meridian

All land below an altitude of 1,000 feet above sea level adjacent to Takatz Lake on Baranof Island and the stream which is its outlet into Chatham Strait, and included in the State's selection application AA–40277 located within:

T. 54 S., R. 66 E., partially surveyed, Secs. 35 and 36.

T. 55 S., R. 66 E., partially surveyed, secs. 2 to 5, inclusive, and sec. 10.

The area described contains approximately 1,355 acres.

2. The State's selection applications made under Section 6(a) of the Alaska Statehood Act of July 7, 1958, 48 U.S.C. note prec. 21, and under Section 906(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. 1635(e), become effective without further action by the State on November 7, 2011, if such land is otherwise available. Land not conveyed to the State will remain subject to the terms and conditions of the Tongass National Forest reservation, Section 24 of the FPA, and any other withdrawal of record.

Authority: 43 CFR 2091.5–4(b).

Julia Dougan,

Acting Alaska State Director.

[FR Doc. 2011–28710 Filed 11–4–11; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORW00000 L51010000, ER0000 LVRWH11H0730 HAG11–0275]

Notice of Realty Action: Direct (Non-Competitive) Sale of Reversionary Interest in Benton County, WA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The reversionary interest held by the United States in the land described in **SUPPLEMENTARY INFORMATION** below has been determined suitable for direct sale and release to the City of West Richland, Washington, under the authority of Section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA). The parcel is currently patented to the City of West Richland, Washington, pursuant to the Recreation and Public Purposes Act of 1926, as amended and supplemented; however, the purpose for which the parcel can be used is restricted by the reversionary clause.

DATES: Comments regarding the proposed sale and other pertinent documents must be received by the Bureau of Land Management (BLM) on or before December 22, 2011.

ADDRESSES: Mail written comments to June E. Hues, Field Manager, Border Field Office, 1103 N. Fancher Road, Spokane Valley, Washington 99212–1275.

FOR FURTHER INFORMATION CONTACT: Mark Hatchel, Realty Specialist, at the address listed above, (509) 536–1211, or by email at: *mhatchel@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339 to contact the above individual during the normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The purpose for the sale of the reversionary interest in the land patented to the City of West Richland, Washington, (City) is to allow and achieve the highest and best uses of the parcel and to meet the needs of the City without the threat of

a reversion of the title for breach of patent conditions. The parcel meets the disposal standards in the 1987 BLM Spokane Resource Management Plan and the regulations at 43 CFR part 2710. The parcel is not needed for Federal purposes and the United States has no present interest in the property other than the reservation of the mineral interests to the United States, and its disposal will be in the public interest. The action is consistent with Federal laws, State and local planning and zoning ordinances. The reversionary interest in this property will be offered by direct sale and released to the City for the fair market value of $1,600,000. The reversionary interest in this property will not be conveyed and released until at least January 6, 2012.

Pursuant to the terms and conditions of the original patent, dated January 13, 1983, the United States retains and continues to hold a reversionary interest on the following land as described in the before-mentioned patent:

Willamette Meridian

T. 9 N., R. 27 E.,
Sec. 12, SE¼SE¼.

The area described contains 40 acres in Benton County.

The City's initial purpose for the parcel was as a sewage interceptor site and lagoon. This use is no longer needed. The City had requested to change the use and control of all or a portion of the parcel from municipal or recreational purposes to commercial purposes to accommodate community expansion and commercial development. Changing the use of the parcel to commercial purposes would violate the terms of the patent. Therefore, the City has requested to purchase the reversionary interest on all or a portion of the parcel. To provide purchase options to the City, the parcel was split into three government lots by means of a cadastral survey that was funded by the City. As a result of the survey, the description of the parcel determined suitable for direct sale and release to the City is now described as:

Willamette Meridian

T. 9 N., R. 27 E.,
Sec. 12, lots 1, 2, and 3.

The area described contains 38.53 acres in Benton County per the official, filed survey, dated April 27, 2011.

Direct sale procedures would be conducted under the provisions found at 43 CFR 2711.3–3(a)(1) and (2) for direct sales. A direct sale to the City is appropriate in this case as the parcel was patented previously to the City and the sale of the Federal reversionary interest, if it were sanctioned to any other entity, would not protect existing equities of the City of West Richland, Washington. The sale and release of the reversionary interest of the 38.53 acres will be made in accordance with FLPMA and the applicable regulations of the Secretary of the Interior, and will be subject to the following:

1. A right-of-way for ditches or canals constructed by the authority of the United States pursuant to the Act of August 30, 1890;

2. A condition that the conveyance be subject to all valid existing rights of record;

3. The terms and conditions of the United States patent 46–83–0050, including, but not limited to, all mineral deposits in the land so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe;

4. All parcels are subject to the requirements of Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. Section 9620(h));

5. No representation, warranty, or covenant of any kind, express or implied, is given or made by the United States as to access to or from any parcel of land, the title, whether or to what extent the land may be developed, its physical condition, present or potential uses, or any other circumstance or condition; and,

6. Additional terms and conditions that the authorized officer deems appropriate. Detailed information concerning the proposed sale, including the appraisal, planning and environmental documents, and Environmental Site Assessment, are available for review at the location identified in **ADDRESSES** above.

Public comments regarding the proposed sale of the reversionary interest may be submitted in writing to the attention of the BLM Border Field Manager (see **ADDRESSES** above) on or before December 22, 2011. Comments received by telephone or in electronic form, such as facsimiles and email, will not be considered. Any adverse written comments will be reviewed by the BLM State Director, who may sustain, vacate, or modify this proposed realty action and issue a final determination. In the absence of timely objections, this proposal shall become the final decision of the Department of the Interior. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 2711.1–2(a).

June E. Hues,

Border Field Manager, Spokane District.

[FR Doc. 2011–28709 Filed 11–4–11; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCA930000.L58790000.EU0000; CACA 50168 12]

Notice of Realty Action: Direct Sale of Public Land in Santa Clara County, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM), Hollister Field Office, proposes to sell a parcel of public land consisting of approximately 15.97 acres, more or less, in Santa Clara County, California. The public land would be sold to Mariposa Peak, LLC, a California Limited Liability Company, for the appraised fair market value of $16,000.

DATES: Written comments regarding the proposed sale must be received by the BLM on or before December 22, 2011.

ADDRESSES: Written comments concerning the proposed sale should be sent to the Field Manager, BLM Hollister Field Office, 20 Hamilton Court, Hollister, California 95023.

FOR FURTHER INFORMATION CONTACT: Christine Sloand, Realty Specialist, BLM Hollister Field Office, 20 Hamilton Court, Hollister, California 95023, phone (831) 630–5022 or visit the Web site at *http://www.blm.gov/ca/st/en/fo/hollister/realty.html.*

SUPPLEMENTARY INFORMATION: The following parcel of public land is being proposed for direct sale to Mariposa Peak, LLC, the adjoining landowner, in accordance with Sections 203 and 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended (43 U.S.C. 1713 and 1719).

Mount Diablo Meridian

T. 11 S., R. 6 E.,
Sec. 2, lot 10.

The area described contains approximately 15.97 acres, more or less, in Santa Clara County.

The public land was first identified as suitable for disposal in the 1984 BLM Hollister Resource Management Plan (RMP) and remains available for sale under the 2007 Hollister RMP revision. The land is not needed for any other Federal purpose, and its disposal would be in the public interest. The purpose of the sale is to dispose of public land which is difficult and uneconomic to manage as part of the public lands because it is a small, isolated parcel lacking legal access. The BLM is proposing a direct sale to Mariposa Peak, LLC. Mariposa Peak, LLC, owns the adjoining land on three sides of the public land proposed for sale. A competitive sale is not considered appropriate because the public land lacks legal access and the only other adjoining landowner has informed the BLM they have no interest in purchasing the land and would not grant access to the public land. The BLM has completed a mineral potential report which concluded there are no known mineral values in the land proposed for sale. The BLM proposes that conveyance of the Federal mineral interests would occur simultaneously with the sale of the land.

On November 7, 2011, the above described land will be segregated from all forms of appropriation under the public land laws, including the mining laws, except for the sale provisions of FLPMA. Until completion of the sale, the BLM will no longer accept land use applications affecting the identified public lands, except applications for the amendment of previously filed right-of-way applications or existing authorizations to increase the term of the grants in accordance with 43 CFR 2802.15 and 2886.15. The segregation terminates upon issuance of a patent, publication in the **Federal Register** of a termination of the segregation, or on November 7, 2013, unless extended by the BLM State Director in accordance with 43 CFR 2711.1–2(d) prior to the termination date. The land would not be sold until at least January 6, 2012. Mariposa Peak, LLC, would be required to pay a $50 nonrefundable filing fee for processing the conveyance of the mineral interests. Any conveyance document issued would contain the following terms, conditions, and reservations:

1. A reservation of a right-of-way to the United States for ditches and canals constructed by authority of the United States under the Act of August 30, 1890 (43 U.S.C. 945);

2. A condition that the conveyance be subject to all valid existing rights of record;

3. An appropriate indemnification clause protecting the United States from claims arising out of the patentee's use, occupancy, or operations on the patented lands; and

4. Additional terms and conditions that the authorized officer deems appropriate.

Detailed information concerning the proposed land sale including the appraisal, planning and environmental documents, and a mineral report are available for review at the BLM Hollister Field Office at the address above, by calling (831) 630–5022 or visiting our Web site at *http://www.blm.gov/ca/st/en/fo/hollister/realty.html*.

Public comments regarding the proposed sale may be submitted in writing to the attention of the BLM Hollister Field Manager (see **ADDRESSES** above) on or before December 22, 2011. Comments received in electronic form, such as email or facsimile, will not be considered. Any adverse comments regarding the proposed sale will be reviewed by the BLM State Director or other authorized official of the Department of the Interior, who may sustain, vacate, or modify this realty action in whole or in part. In the absence of timely filed objections, this realty action will become the final determination of the Hollister Field Office.

Before including your address, phone number, email address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Authority: 43 CFR 2711.1–2(a) and (c).

Tom Pogacnik,

Deputy State Director, Natural Resources.

[FR Doc. 2011–28749 Filed 11–4–11; 8:45 am]

BILLING CODE 4310–40–P

INTERNATIONAL TRADE COMMISSION

[DN 2853]

Certain Communications Equipment, Components Thereof, and Products Containing the Same, Including Power Over Ethernet Telephones, Switches, Wireless Access Points, Routers and Other Devices Used in WLANs and Cameras; Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Communications Equipment, Components Thereof, and Products Containing the Same, Including Power Over Ethernet Telephones, Switches, Wireless Access Points, Routers and Other Devices Used in WLANs and Cameras*, DN 2853; the Commission is soliciting comments on any public interest issues raised by the complaint.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint filed on ChriMar Systems, Inc. d/b/a CMS Technologies on November 1, 2011. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of

certain communication equipment, components thereof, and products containing the same, including power over Ethernet telephones, switches, wireless access points, routers and other devices used in WLANs and cameras. The complaint names as respondents Cisco Systems, Inc. of San Jose, CA; Cisco Consumer Products LLC of Irvine, CA; Cisco Systems International B.V. of Amsterdam, Netherlands; Cisco-Linksys LLC of Irvine, CA; Hewlett-Packard Co. of Palo Alto, CA; 3Com Corporation, Marlborough, MA; Avaya Inc. of Basking Ridge, NJ and Extreme Networks, Inc. of Santa Clara, CA.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers. In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) Indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) Indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, five business days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Submissions should refer to the docket number (''Docket No. 2853'') in a prominent place on the cover page and/or the first page. The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf.* Persons with questions regarding electronic filing should contact the Secretary ((202) 205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

By order of the Commission.

Issued: November 1, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–28685 Filed 11–4–11; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0003]

Agency Information Collection Activities: Extension of a Currently Approved Collection; Annual Progress Report for the STOP Formula Grants Program

ACTION: 60-Day notice of information collection under review.

The Department of Justice, Office on Violence Against Women (OVW) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. Comments are encouraged and will be accepted for ''sixty days'' until January 6, 2012. This process is conducted in accordance with 5 CFR 1320.10.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to email them to *oira_submission@omb.eop.gov* or fax them to (202) 395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please Cathy Poston, Office on Violence Against Women, at (202) 514–5430 or the DOJ Desk Officer at (202) 395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Annual Progress Report for the STOP Formula Grants Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122–0003. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the 56 STOP state administrators (from 50 states, the District of Columbia and five territories and commonwealths (Guam, Puerto Rico, American Samoa, Virgin Islands, Northern Mariana Islands)) and their subgrantees. The STOP Violence Against Women Formula Grants Program was authorized

through the Violence Against Women Act of 1994 (VAWA) and reauthorized and amended by the Violence Against Women Act of 2000 (VAWA 2000) and by the Violence Against Women Act of 2005 (VAWA 2005). Its purpose is to promote a coordinated, multi-disciplinary approach to improving the criminal justice system's response to violence against women. The STOP Formula Grants Program envisions a partnership among law enforcement, prosecution, courts, and victim advocacy organizations to enhance victim safety and hold offenders accountable for their crimes of violence against women. OVW administers the STOP Formula Grants Program. The grant funds must be distributed by STOP state administrators to subgrantees according to a statutory formula (as amended by VAWA 2000 and by VAWA 2005).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the 56 respondents (STOP administrators) approximately one hour to complete an annual progress report. It is estimated that it will take approximately one hour for roughly 2500 subgrantees [1] to complete the relevant portion of the annual progress report. The Annual Progress Report for the STOP Formula Grants Program is divided into sections that pertain to the different types of activities that subgrantees may engage in and the different types of subgrantees that receive funds, *i.e.* law enforcement agencies, prosecutors' offices, courts, victim services agencies, *etc.*

(6) An estimate of the total public burden (in hours) associated with the collection: The total annual hour burden to complete the annual progress report is 2,556 hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 2E–508, Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2011–28711 Filed 11–4–11; 8:45 am]

BILLING CODE 4410–FX–P

[1] Each year the number of STOP subgrantees changes. The number 2,500 is based on the number of reports that OVW has received in the past from STOP subgrantees.

DEPARTMENT OF JUSTICE

[OMB Number 1105–0008]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Extension of a Currently Approved Collection; Claim for Damage, Injury, or Death

ACTION: 60-Day notice of information collection under review.

The Department of Justice (DOJ), Civil Division, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until January 6, 2012. This process is conducted in accordance with 5 CFR 1320.10.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to email them to *oira_submission@omb.eop.gov* or fax them to (202) 395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please contact the Director, Torts Branch, Civil Division, U.S. Department of Justice, Washington, DC 20530, or call the DOJ Desk Officer at (202) 395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Claim for Damage, Injury, or Death.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form Number: CIV SF 95. Civil Division, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: Business or other for-profit, Not-for-profit institutions, and State, Local, or Tribal Governments. Abstract: This form is utilized by those persons making a claim against the United States Government under the Federal Tort Claims Act.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that there will be 100,000 respondents who will each require 6 hours to respond.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual burden hours to complete the certification form is 600,000 hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 2E–508, Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2011–28715 Filed 11–4–11; 8:45 am]

BILLING CODE 4410–12–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0006]

Agency Information Collection Activities: Extension of a Currently Approved Collection; Semi-Annual Progress Report for the Grants To Encourage Arrest Policies and Enforcement Protection Orders Program

ACTION: 60-Day notice of information collection under review.

The Department of Justice, Office on Violence Against Women (OVW) will be

submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. Comments are encouraged and will be accepted for ''sixty days'' until January 6, 2012. This process is conducted in accordance with 5 CFR 1320.10.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to email them to *oira_submission@omb.eop.gov* or fax them to (202) 395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please Cathy Poston, Office on Violence Against Women, at (202) 514–5430 or the DOJ Desk Officer at (202) 395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from the Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122–0006. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 200 grantees from the Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program (Arrest Program) which recognizes that sexual assault, domestic violence, dating violence, and stalking are crimes that require the criminal justice system to hold offenders accountable for their actions through investigation, arrest, and prosecution of violent offenders, and through close judicial scrutiny and management of offender behavior.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 200 respondents (Arrest Program grantees) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. An Arrest Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 400 hours, that is 200 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 2E–508, Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2011–28712 Filed 11–4–11; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Water Act

Notice is hereby given that on October 31, 2011, a proposed Consent Decree in *United States of America* v. *E.I. Du Pont de Nemours & Co.,* Case No. 1:11–cv–01057–UNA, D.J. Ref. 90–5–2–1–09746, was lodged with the United States District Court for the District of Delaware.

In this action the United States and Delaware sought civil penalties and injunctive relief in connection with Defendant E.I. Du Pont de Nemours & Co.'s (''Dupont'') violations of (1) Sections 301(a), 309(b) and (d), and 402 of the Federal Water Pollution Control Act, also known as the Clean Water Act, 42 U.S.C. 1311(a), 1319(b) and (d), and 1342 (the ''CWA''), and (2) the Delaware Environmental Protection Act, 7 Del.0C. §§ 6001 *et seq.,* and Delaware's Regulations Governing the Control of Water Pollution, 7 *Del. Admin. Code* § 7201. The United States and Delaware contend that Dupont violated its National Pollutant Discharge Elimination System permit on numerous occasions at its titanium dioxide production facility in Edge Moor, Delaware (''Edge Moor Plant''), near Wilmington, and also committed violations related to an inadequate Stormwater Pollution Prevention Plan and deficient Best Management Practices.

Under the proposed consent decree, Dupont has obligated itself to perform a comprehensive engineering study of the wastewater treatment plant and wastewater collection system at the Edge Moor Plant to correct any conditions which may result in violations of the above federal and state environmental protection laws. It has also agreed to pay a civil penalty of $500,000 to resolve its alleged liability. The penalty will be shared equally by the United States and Delaware.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States of America* v. *E.I. Du Pont de Nemours & Co.,* Case No. 1:11–cv–01057–UNA, D.J. Ref. 90–5–2–1–09746.

During the public comment period, the Consent Decree may be examined on the following Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html,* maintained by the Department of Justice. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or emailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent

Decree Library, please enclose a check in the amount of $10.50 (@ 25 cents per page reproduction cost) payable to the U.S. Treasury or, if by email or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Robert Brook,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–28730 Filed 11–4–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB 1121—New]

Agency Information Collection Agencies: New Collection; Comments Requested; Census of Problem-Solving Courts 2011

ACTION: 30-Day notice of information collection under review.

The Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. The proposed information collection was previously published in the **Federal Register** Volume 76, Number 166, pages 53489–53491, on August 26, 2011, allowing a 60-day public comment period.

The purpose of this notice is to allow an additional 30 days for public comment until December 7, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to email them to *oira_submission@omb.eop.gov* or fax them to (202) 395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please call Ron Malega at (202) 353–0487 or the DOJ Desk Officer at (202) 395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information:

1. *Type of information collection:* New data collection, Census of Problem-Solving Courts (CPSC), 2011.

2. *The title of the form/collection:* Census of Problem-Solving Courts or CPSC, 2011.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form labels are CPSC, Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice.

4. *Affected Public Who Will be Asked or Required to Respond, as well as a Brief Abstract:* Problem-solving courts at all levels of government. Abstract: The Bureau of Justice Statistics (BJS) proposes to implement a Census of Problem-Solving Courts (CPSC). Problem-solving courts target defendants who have ongoing social and/or psychological conditions that underlie their repeated contact with the criminal justice system. Most of the existing information about problem-solving courts (PSC) consists of court evaluations or outcome analyses. No prior census of these courts has been conducted to date despite the substantial proliferation of such courts during the past thirty years. Hence, the CPSC will allow BJS to provide national level information on problem-solving courts and case processing statistics and it will also create a sampling frame of PSCs thereby enabling BJS to conduct future sample-based research on PSCs.

The CPSC is designed to provide BJS and other interested stakeholders with the first systematic empirical information on problem-solving courts. A goal of the census is to obtain information on problem-solving court operations, administration, and to generate accurate and reliable statistics on adult offenders who enter problem-solving court programs. The CPSC will collect information on the following categories:

a. Court Operations:

i. Does the court operate within the judiciary, have a dedicated judicial officer, or have a dedicated docket/calendar?

ii. Provide the number of problem-solving courts by type (*e.g.,* mental health, drug, etc.)

iii. Determine PSCs level of government operations (*e.g.,* local, state, etc.), court jurisdiction (*e.g.,* limited, general, other) and intake of felony, misdemeanor, or status offenses

b. Funding: Types and prevalence of PSC funding (*e.g.,* local government budget, state budget, etc.)

c. Commonly Used Services:

i. Count the types and prevalence of offender/victim services (*e.g.,* anger management), counseling or treatment services (*e.g.,* outpatient mental health treatment), and general supportive services (*e.g.,* life skills)

d. Participant participation:

i. Participant inclusionary and exclusionary factors,

ii. Participant point of entry (*e.g.* pre-plea, post-plea/pre-sentence, etc.)

e. Capacity and Enrollment:

i. Total number of active participants PSC can manage at any one time

ii. Current number of active participants

f. Data Collection Practices:

i. Use of automated case management systems

ii. PSCs' ability to query information

g. PSC Participant information:

i. Percentage of program participants by age, gender, racial classification,

ii. Housing status

iii. Employment status

h. PSC information for calendar year 2011 only:

i. Number of people referred and admitted to PSCs,

ii. PSCs' average participant attendance to: Scheduled judicial, community supervision meetings, treatment sessions, and drug tests

iii. Number of participants exiting program,

iv. Number of participants by gender, race, and age.

Additionally, the information collected through this census will support development of a sampling framework to examine case processing information and case dispositions of adults in problem-solving courts. Information will be collected for the 2011 calendar year.

5. *An Estimate of the Total Number of Respondents and the Amount of Time Estimated for an Average Respondent to Respond:* Estimates suggest 3,800

respondents will take part in the Census of Problem-Solving Courts 2011. The average (mean) burden for each completed survey is almost 1 hour per respondent. The estimated range of burden for respondents is between 40 minutes to 2 hours for completion. The following factors were considered when creating the burden estimate: the total number of drug courts in the field, the total number of mental health courts, the ability of problem-solving courts (by type) to access data, and the type of data capabilities generally found in the field. Using these criteria, respondents were categorized into three groups depending upon whether they had the capacity to complete only part I or both parts (I&II) of the survey. Group A respondents will have the least access to data and complete only part one of the survey. Approximately 2,300 respondents will be in this group. It is estimated that respondents in group A will take 40 minutes to complete the survey. Group (B) respondents will complete part one of the survey and have access to only limited information necessary for part two of the survey. Approximately 1,200 respondents will be in this group. This second group of respondents will take about 1 hour and 15 minutes to complete a survey. The third group (C) of respondents will complete parts one and two of the survey; they will have the greatest access to the information required for part two of the survey. Approximately 300 respondents will be in group C. It is estimated it will take this group about 2 hours to complete the survey.

6. *An Estimate of the Total Public Burden (in hours) Associated with the collection:* The estimated public burden associated with this collection is 3,633 hours. Respondents were categorized into three groups depending upon whether they had the capacity to complete only part I or both parts (I & II) of the survey. Approximately 2,300 respondents will fall into the first group (A) of respondents, completing only part one of the survey. It is estimated that respondents in this group will take 40 minutes to complete a survey for a total of 1,533 hours. The second group (B) of respondents will complete part one of the survey and have access to only limited amount of information necessary for part two of the survey. The approximately 1,200 respondents in this second group of respondents will take about 1 hour and 15 minutes to complete a survey for a total of 1,500 hours. The third group (C) of respondents will complete parts one and two of the survey; they will have the greatest access to the information required for part two of the survey. It is estimated it will take the estimated 300 respondents in this group about 2 hours each to complete a survey for a total of 600 hours. When the burden hours for each group of respondents are added up, the CPSC 2011 project sums to 3,633 hours (1,533 + 1,500 + 600 = 3,633).

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Suite 2E–508, Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2011–28713 Filed 11–4–11; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment and Training Administration

Federal-State Unemployment Compensation Program: Certifications for 2011 Under the Federal Unemployment Tax Act

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Secretary of Labor signed the annual certifications under the Federal Unemployment Tax Act, 26 U.S.C. 3301 *et seq.,* thereby enabling employers who make contributions to state unemployment funds to obtain certain credits against their liability for the federal unemployment tax. By letter, the certifications were transmitted to the Secretary of the Treasury. The letter and certifications are printed below.

Signed in Washington, DC, October 31, 2011.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

October 31, 2011
Honorable Timothy F. Geithner,
Secretary of the Treasury,
Department of the Treasury,
1500 Pennsylvania Avenue, NW.,
Washington, DC 20220.

Dear Secretary Geithner:

Transmitted herewith are an original and one copy of the certifications of the states and their unemployment compensation laws for the 12-month period ending on October 31, 2011. One is required with respect to the normal federal unemployment tax credit by Section 3304 of the Internal Revenue Code of 1986 (IRC), and the other is required with respect to the additional tax credit by Section 3303 of the IRC. Both certifications list all 53 jurisdictions.

Sincerely,

Hilda L. Solis,
Secretary of Labor.

Enclosures

UNITED STATES DEPARTMENT OF LABOR OFFICE OF THE SECRETARY WASHINGTON, DC

CERTIFICATION OF STATES TO THE SECRETARY OF THE TREASURY PURSUANT TO SECTION 3304(c) OF THE INTERNAL REVENUE CODE OF 1986

In accordance with the provisions of Section 3304(c) of the Internal Revenue Code of 1986 (26 U.S.C. 3304(c)), I hereby certify the following named states to the Secretary of the Treasury for the 12-month period ending on October 31, 2011, in regard to the unemployment compensation laws of those states which heretofore have been approved under the Federal Unemployment Tax Act:

Alabama
Alaska
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Florida
Georgia
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Puerto Rico
Rhode Island
South Carolina
South Dakota
Tennessee
Texas
Utah
Vermont
Virginia
Virgin Islands
Washington
West Virginia
Wisconsin

Wyoming

This certification is for the maximum normal credit allowable under Section 3302(a) of the Code.

Signed at Washington, DC, on October 31, 2011.

Hilda L. Solis,
Secretary of Labor.

UNITED STATES DEPARTMENT OF LABOR OFFICE OF THE SECRETARY WASHINGTON, DC

CERTIFICATION OF STATE UNEMPLOYMENT COMPENSATION LAWS TO THE SECRETARY OF THE TREASURY PURSUANT TO SECTION 3303(b)(1) OF THE INTERNAL REVENUE CODE OF 1986

In accordance with the provisions of paragraph (1) of Section 3303(b) of the Internal Revenue Code of 1986 (26 U.S.C. 3303(b)(1)), I hereby certify the unemployment compensation laws of the following named states, which heretofore have been certified pursuant to paragraph (3) of Section 3303(b) of the Code, to the Secretary of the Treasury for the 12-month period ending on October 31, 2011:

Alabama
Alaska
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Florida
Georgia
Hawaii
Mississippi
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Puerto Rico
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
South Dakota
Tennessee
Texas
Utah
Vermont
Virginia
Virgin Islands
Washington
West Virginia
Wisconsin
Wyoming

This certification is for the maximum additional credit allowable under Section 3302(b) of the Code, subject to the limitations of Section 3302(c) of the Code.

Signed at Washington, DC, on October 31, 2011.

Hilda L. Solis,
Secretary of Labor.

[FR Doc. 2011–28876 Filed 11–4–11; 8:45 am]

BILLING CODE 4510–30–P

NATIONAL SCIENCE FOUNDATION

Notice of Availability for Public Comment on the Interagency Ocean Observing Committee Draft Certification Criteria for Non-Federal Asset Integration Into IOOS

AGENCY: National Science Foundation (NSF).

ACTION: Notice of availability.

SUMMARY: The National Science Foundation publishes this notice on behalf of the Interagency Ocean Observation Committee (IOOC) to announce a 60-day public comment period for non-federal asset certification criteria. This draft certification criteria will be used to establish eligibility for non-federal assets to be integrated into the U.S. Integrated Ocean Observation System (IOOS) and to ensure compliance with all applicable standards and protocols. This criteria was developed in response to a requirement in the Integrated Coastal Ocean Observation System Act of 2009 (33 U.S.C. 3601–3610) and is applicable to all non-federal assets as defined in the Act, including Regional Information Coordination Entities (RICEs).

DATES: Written, faxed or emailed comments must be received no later than 5 p.m. eastern standard time on January 6, 2012.

ADDRESSES: The IOOC draft certification criteria is available for review from the IOOC Web site URL: *http://www.iooc.us.* For the public unable to access the internet, printed copies can be requested by contacting the IOOC Support Office at the address below. The public is encouraged to submit comments electronically to *certification@oceanleadership.org.* If you are unable to access the Internet, comments may be submitted via fax or regular mail. Faxed comments should be sent to (202) 332–8887 with *Attn:* IOOC Support Office. Comments may be submitted in writing to the Consortium for Ocean Leadership, *Attention:* IOOC Support Office, 1201 New York Avenue NW., 4th Floor, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: For further information about this notice, please contact the IOOC Support Office, telephone: (202) 787–1622; Email: *certification@oceanleadership.org.*

SUPPLEMENTARY INFORMATION: On 30 March 2009, President Barack Obama signed into law the Integrated Coastal and Ocean Observation System Act of 2009. Among the requirements in the Act is a directive to the IOOC to ''develop contract certification standards and compliance procedures for all non-Federal assets, including regional information coordination entities, to establish eligibility for integration into the System and to ensure compliance with all applicable standards and protocols established by the Council, and ensure that regional observations are integrated into the System on a sustained basis.'' The IOOC chartered two working groups consisting of subject matter experts on IOOS data partners and regional entities to draft recommended certification criteria. The recommended criteria were approved by the IOOC on 20 October 2011 and further information on the specific criteria can be obtained by contacting the IOOC Support Office as directed in the section above.

The IOOC is the federal interagency group established to lead the interagency planning and coordination of ocean observing activities including IOOS, and is represented by federal agencies, with NOAA identified as the lead federal agency by for IOOS implementation and administration.

Dated: November 2, 2011.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2011–28731 Filed 11–4–11; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2011–0160]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently

submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on August 9, 2011 (76 FR 48908).

1. *Type of submission, new, revision, or extension:* New.

2. *The title of the information collection:* Employment Application System for Entry-Level Legal Positions.

3. *Current OMB approval number:* 3150–XXXX.

4. *The form number if applicable:* n/a.

How often the collection is required: On occasion.

5. *Who will be required or asked to report:* Applicants seeking employment through the NRC Office of the General Counsel Honor Law Graduate Program or Summer Internship Program.

6. *An estimate of the number of annual responses:* 1,500.

7. *The estimated number of annual respondents:* 1,500.

8. *An estimate of the total number of hours needed annually to complete the requirement or request:* 1,500.

9. *Abstract:* The NRC is seeking to implement a Web-based job application system that will allow the NRC Office of the General Counsel to track, manage, and interact with applicants seeking entry-level attorney positions through the Honor Law Graduate program or temporary, summer legal positions through the Summer Internship Program. Applicants seeking employment consideration will submit application materials, including cover letters, resumes, school transcripts, lists of references, and writing samples, via a Web-based interface. These application materials may contain names, addresses, phone numbers, email addresses, school information/grades, employment information/histories, and works of writing.

The public may examine and have copied for a fee publicly available documents, including the final supporting statement, at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. OMB clearance requests are available at the NRC Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by December 7, 2011. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Chad Whiteman, Desk Officer, Office of Information and Regulatory Affairs (3150–XXXX), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be emailed to *CWhiteman@omb.eop.gov* or submitted by telephone at (202) 395–4718.

The NRC Clearance Officer is Tremaine Donnell, (301) 415–6258.

Dated at Rockville, Maryland, this 1st day of November, 2011.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2011–28733 Filed 11–4–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2011–0140]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on July 7, 2011 (76 FR 39907).

1. *Type of submission, new, revision, or extension:* Revision.

2. *The title of the information collection:* 10 CFR part 74—Material Control and Accounting of Special Nuclear Material.

3. *Current OMB approval number:* 3150–0123.

4. *The form number if applicable:* N/A.

5. *How often the collection is required:* Submission is a one-time requirement which has been completed by all current licensees. However, licensees may submit amendments or revisions to the plans as necessary. In addition, specified inventory and material status reports are required annually or semi-annually. Other reports are submitted as events occur.

6. *Who will be required or asked to report:* Persons licensed under 10 CFR part 70 who possess and use certain forms and quantities of Special Nuclear Material (SNM).

7. *An estimate of the number of annual responses:* 131.

8. *The estimated number of annual respondents:* 19.

9. *An estimate of the total number of hours needed annually to complete the requirement or request:* An annual total of 8,589 hours (989 hours for reporting and 7,600 hours for recordkeeping). The average annual burden per respondent for reporting is 47 hours. The average annual burden per recordkeeping for the 110 record keepers is 61 hours.

10. *Abstract:* 10 CFR part 74 establishes requirements for material control and accounting of SNM, and specific performance-based regulations for licensees authorized to possess, use and produce strategic special nuclear material, and special nuclear material of moderate strategic significance and low strategic significance. The information is used by the NRC to make licensing and regulatory determinations concerning material control and accounting of special nuclear material and to satisfy obligations of the United States to the International Atomic Energy Agency (IAEA). Submission or retention of the information is mandatory for persons subject to the requirements.

The public may examine and have copied for a fee publicly available documents, including the final supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. OMB clearance requests are available at the NRC Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by December 7, 2011. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be

given to comments received after this date.

Chad Whiteman, Desk Officer, Office of Information and Regulatory Affairs (3150–0123), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be emailed to *CWhiteman@omb.eop.gov* or submitted by telephone at (202) 395–4718.

The NRC Clearance Officer is Tremaine Donnell, (301) 415–6258.

Dated at Rockville, Maryland, this 1st day of November, 2011.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2011–28732 Filed 11–4–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee on Economic Simplified Boiling Water Reactor; Notice of Meeting

The ACRS Subcommittee on Economic Simplified Boiling Water Reactor (ESBWR) will hold a meeting on November 30, 2011, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, November 30, 2011—8:30 a.m. until 2 p.m.

The Subcommittee will review Chapters 9, 11, 12, and 13 of the Fermi RCOLA Safety Evaluation Report (SER). The Subcommittee will hear presentations by and hold discussions with the NRC staff, Detroit Edison Company, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Christopher Brown (Telephone (301) 415–7111 or Email: *Christopher.Brown@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64127–64128).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs*. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (240) 888–9835 to be escorted to the meeting room.

Dated: November 1, 2011.

Yoira Diaz-Sanabria,

Technical Assistant, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2011–28737 Filed 11–4–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on November 29, 2011, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to the internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows:

Tuesday, November 29, 2011—12 p.m. Until 1 p.m.

The Subcommittee will discuss proposed ACRS activities and related matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee. The Designated Federal Official (DFO), Mr. Cayetano Santos (Telephone (301) 415–7270 or Email: *Cayetano.Santos@nrc.gov*). Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011 (76 FR 64127–64128).

Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (240) 888–9835 to be escorted to the meeting room.

Dated: October 31, 2011.

Yoira Diaz-Sanabria,

Technical Assistant, Reactor Safety Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2011–28738 Filed 11–4–11; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. A2012–34; Order No. 940]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of

the East Vassalboro, Maine post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

DATES: *November 9, 2011:* Administrative record due (from Postal Service); November 28, 2011, 4:30 p.m., Eastern Time: Deadline for notices to intervene. *See* the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

ADDRESSES: Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at (202) 789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 39 U.S.C. 404(d), on October 25, 2011, the Commission received two petitions for review of the Postal Service's determination to close the East Vassalboro post office in East Vassalboro, Maine. The first petition for review was filed by Charles Ferguson. The second petition for review was filed by the Save Our Post Office Committee. The earliest postmark date is October 14, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2012–34 to consider Petitioners' appeal. If Petitioners would like to further explain their position with supplemental information or facts, Petitioners may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than November 29, 2011.

Categories of issues apparently raised. Petitioners contend that (1) The Postal Service failed to consider the effect of the closing on the community (*see* 39 U.S.C. 404(d)(2)(A)(i)); (2) the Postal Service failed to consider whether or not it will continue to provide a maximum degree of effective and regular postal services to the community (*see* 39 U.S.C. 404(d)(2)(A)(iii)); and (3) Petitioners contend that the Postal Service failed to provide substantial evidence in support of the determination (*see* 39 U.S.C. 404(d)(5)(c)).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than the one set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the applicable administrative record with the Commission is November 9, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this notice is November 9, 2011.

Availability; Web site posting. The Commission has posted the appeal and supporting material on its Web site at *http://www.prc.gov.* Additional filings in this case and participant's submissions also will be posted on the Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at (202) 789–6873 or via electronic mail at *prc-webmaster@prc.gov.*

The appeal and all related documents are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Eastern Time, Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

Filing of documents. All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained. *See* 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site, *http://www.prc.gov,* or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than the Petitioners and respondents, wishing to be heard in this matter are directed to file a notice of intervention. *See* 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before November 28, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained for hardcopy filing. *See* 39 CFR 3001.9(a) and 3001.10(a).

Further procedures. By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. *See* 39 U.S.C. 404(d)(5). A procedural schedule has been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. *See* 39 CFR 3001.21.

It is ordered:

1. The Postal Service shall file the applicable administrative record regarding this appeal no later than November 9, 2011.

2. Any responsive pleading by the Postal Service to this notice is due no later than November 9, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Natalie Ward is designated officer of the Commission (Public Representative) to represent the interests of the general public.

5. The Secretary shall arrange for publication of this notice and order and Procedural Schedule in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

PROCEDURAL SCHEDULE

October 25, 2011	Filing of Appeal.
November 9, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
November 9, 2011	Deadline for the Postal Service to file any responsive pleading.
November 28, 2011	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
November 29, 2011	Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).

PROCEDURAL SCHEDULE—Continued

December 19, 2011	Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)).
January 3, 2011	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).
January 10, 2011	Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (*see* 39 CFR 3001.116).
February 13, 2012	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)).

[FR Doc. 2011–28734 Filed 11–4–11; 8:45 am]
BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. A2012–35; Order No. 941]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Rembrandt, Iowa post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

DATES: November 9, 2011: Administrative record due (from Postal Service); November 28, 2011, 4:30 p.m., Eastern Time: Deadline for notices to intervene. *See* the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

ADDRESSES: Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at (202) 789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 39 U.S.C. 404(d), on October 25, 2011, the Commission received three petitions for review of the Postal Service's determination to close the Rembrandt post office in Rembrandt, Iowa. The first petition for review was filed by Joleen J. Anderson. The second petition for review was filed by the City of Rembrandt. The third petition for review was filed by Jerri J. Haraldson. The earliest postmark date is October 6, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2012–35 to consider Petitioners' appeal. If Petitioners would like to further explain their position with supplemental information or facts, Petitioners may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than November 29, 2011.

Categories of issues apparently raised. Petitioners contend that (1) the Postal Service failed to consider the effect of the closing on the community (*see* 39 U.S.C. 404(d)(2)(A)(i)); (2) the Postal Service failed to consider whether or not it will continue to provide a maximum degree of effective and regular postal services to the community (*see* 39 U.S.C. 404(d)(2)(A)(iii)); (3) the Postal Service failed to adequately consider the economic savings resulting from the closure (*see* 39 U.S.C. 404(d)(2)(A)(iv)); and (4) Petitioners contend that the Postal Service failed to provide substantial evidence in support of the determination (*see* 39 U.S.C. 404(d)(5)(c)).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than the one set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the applicable administrative record with the Commission is November 9, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this notice is November 9, 2011.

Availability; Web site posting. The Commission has posted the appeal and supporting material on its Web site at *http://www.prc.gov.* Additional filings in this case and participant's submissions also will be posted on the Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at (202) 789–6873 or via electronic mail at *prc-webmaster@prc.gov.*

The appeal and all related documents are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Eastern Time, Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

Filing of documents. All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained. *See* 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site, *http://www.prc.gov,* or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than the Petitioners and respondents, wishing to be heard in this matter are directed to file a notice of intervention. *See* 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before November 28, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained for hardcopy filing. *See* 39 CFR 3001.9(a) and 3001.10(a).

Further procedures. By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. *See* 39 U.S.C. 404(d)(5). A procedural schedule has been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. *See* 39 CFR 3001.21.

It is ordered:

1. The Postal Service shall file the applicable administrative record regarding this appeal no later than November 9, 2011.

2. Any responsive pleading by the Postal Service to this notice is due no later than November 9, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Pamela Thompson is designated officer of the Commission (Public Representative) to represent the interests of the general public.

5. The Secretary shall arrange for publication of this notice and order and Procedural Schedule in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

PROCEDURAL SCHEDULE

November 9, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
November 9, 2011	Deadline for the Postal Service to file any responsive pleading.
November 28, 2011	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
November 29, 2011	Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).
December 19, 2011	Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)).
January 3, 2011	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).
January 10, 2011	Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (*see* 39 CFR 3001.116).
February 3, 2012	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)).

[FR Doc. 2011–28736 Filed 11–4–11; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 15c1–5, SEC File No. 270–422, OMB Control No. 3235–0471.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 15c1–5 (17 CFR 240.15c1–5) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 15c1–5 states that any broker-dealer controlled by, controlling, or under common control with the issuer of a security that the broker-dealer is trying to sell to or buy from a customer must give the customer written notification disclosing the control relationship at or before completion of the transaction. The Commission estimates that 241 respondents collect information annually under Rule 15c1–5 and that each respondent would spend approximately 10 hours per year collecting this information (2,410 hours in aggregate). There is no retention period requirement under Rule 15c1–5. This Rule does not involve the collection of confidential information.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does display a valid Office of Management (OMB) control number.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: November 1, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28721 Filed 11–4–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available from: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 12f–1; OMB Control No. 3235–0128; SEC File No. 270–139.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit the existing collection of information to the Office of Management and Budget for extension and approval. For Rule 12f–1 (17 CFR 240.12f–1)—Applications for permission to reinstate unlisted trading privileges.

Rule 12f–1 (the ''Rule''), originally adopted in 1934 pursuant to Sections 12(f) and 23(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Act''), as modified in 1995 and 2005, sets forth the information which an exchange must include in an application to reinstate its ability to extend unlisted trading privileges to any security for which such unlisted trading privileges have been suspended by the Commission, pursuant to Section 12(f)(2)(A) of the Act. An application must provide the name of the issuer, the title of the security, the name of each national securities exchange, if any, on which the security is listed or admitted to unlisted trading privileges, whether transaction information concerning the security is reported pursuant to an

effective transaction reporting plan contemplated by Rule 601 of Regulation NMS, the date of the Commission's suspension of unlisted trading privileges in the security on the exchange, and any other pertinent information. Rule 12f–1 further requires a national securities exchange seeking to reinstate its ability to extend unlisted trading privileges to a security to indicate that it has provided a copy of such application to the issuer of the security, as well as to any other national securities exchange on which the security is listed or admitted to unlisted trading privileges.

The information required by Rule 12f–1 enables the Commission to make the necessary findings under the Act prior to granting applications to reinstate unlisted trading privileges. This information is also made available to members of the public who may wish to comment upon the applications. Without the Rule, the Commission would be unable to fulfill these statutory responsibilities.

There are currently 15 national securities exchanges subject to Rule 12f–1. The burden of complying with Rule 12f–1 arises when a potential respondent seeks to reinstate its ability to extend unlisted trading privileges to any security for which unlisted trading privileges have been suspended by the Commission, pursuant to Section 12(f)(2)(A) of the Act. The staff estimates that each application would require approximately one hour to complete. Thus each potential respondent would incur on average one burden hour in complying with the Rule.

The Commission staff estimates that there could be as many as 15 responses annually and that each respondent's related cost of compliance with Rule 12f–1 would be $168.00, or, the cost of one hour of professional work of a paralegal needed to complete the application. The total annual related reporting cost for all potential respondents, therefore, is $2,520 (15 responses × $168.00 per response).

Compliance with Rule 12f–1 is mandatory. Rule 12f–1 does not have a record retention requirement *per se.* However, responses made pursuant to Rule 12f–1 are subject to the recordkeeping requirements of Rules 17a–3 and 17a–4 of the Act. Information received in response to Rule 12f–1 shall not be kept confidential; the information collected is public information.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: November 1, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28719 Filed 11–4–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available from: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 12f–3; OMB Control No. 3235–0249; SEC File No. 270–141.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit the existing collection of information to the Office of Management and Budget for extension and approval for Rule 12f–3 (17 CFR 240.12f–3)—Termination or Suspension of Unlisted Trading Privileges

Rule 12f–3 (the ''Rule''), which was originally adopted in 1934 pursuant to Sections 12(f) and 23(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Act''), as modified in 1995, prescribes the information which must be included in applications for and notices of termination or suspension of unlisted trading privileges for a security as contemplated in Section 12(f)(4) of the Act. An application must provide, among other things, the name of the applicant; a brief statement of the applicant's interest in the question of termination or suspension of such unlisted trading privileges; the title of the security; the name of the issuer; certain information regarding the size of the class of security and its recent trading history; and a statement indicating that the applicant has provided a copy of such application to the exchange from which the suspension or termination of unlisted trading privileges are sought, and to any other exchange on which the security is listed or admitted to unlisted trading privileges.

The information required to be included in applications submitted pursuant to Rule 12f–3, is intended to provide the Commission with sufficient information to make the necessary findings under the Act to terminate or suspend by order the unlisted trading privileges granted a security on a national securities exchange. Without the Rule, the Commission would be unable to fulfill these statutory responsibilities.

The burden of complying with Rule 12f–3 arises when a potential respondent, having a demonstrable bona fide interest in the question of termination or suspension of the unlisted trading privileges of a security, determines to seek such termination or suspension. The staff estimates that each such application to terminate or suspend unlisted trading privileges requires approximately one hour to complete. Thus each potential respondent would incur on average one burden hour in complying with the Rule.

The Commission staff estimates that there could be as many as 15 responses annually and that each respondent's related cost of compliance with Rule 12f–3 would be $168.00, or, the cost of one hour of professional work of a paralegal needed to complete the application. The total annual related reporting cost for all potential respondents, therefore, is $2,520 (15 responses x $168.00/response).

Compliance with the application requirements of Rule 12f–3 is mandatory, though the filing of such applications is undertaken voluntarily. Rule 12f–3 does not have a record retention requirement *per se.* However, responses made pursuant to Rule 12f–3

are subject to the recordkeeping requirements of Rules 17a–3 and 17a–4 of the Act. Information received in response to Rule 12f–3 shall not be kept confidential; the information collected is public information.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: November 1, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28720 Filed 11–4–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt a Market-Maker Trade Prevention Order on CBOE Stock Exchange

November 1, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 28, 2011, the Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a Market-Maker Trade Prevention Order on CBOE Stock Exchange (''CBSX''). The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

1. Purpose

The Exchange proposes to adopt a Market-Maker Trade Prevention (''MMTP'') Order. The proposed MMTP Order is an immediate-or-cancel order containing a designation that prevents incoming orders for a Market-Maker from executing against resting quotes and orders for the same Market-Maker.

The MMTP Order type designation is intended to prevent a Market-Maker from trading on both sides of the same transaction. Orders would be marked with the MMTP designation on an order-by-order basis. An incoming MMTP Order cannot interact with interest resting on the book from the same Market-Maker. An MMTP Order that would trade against a resting quote or order for the same Market-Maker will be cancelled, as will the resting quote or order. The MMTP Order will trade against other tradable orders and quotes entered by or on behalf of another market participant (other than those entered by or on behalf of the same Market-Maker) in accordance with the execution process described in Exchange Rule 52.1 (Matching Algorithm/Priority). When available, the MMTP Order type will be available for use by all Market-Makers in all appointments.

For example, assume the Exchange's best bid and offer is $1.00–$1.20, 1000 shares on each side. A Market-Maker marks an order to buy 1000 shares at $1.20 with the MMTP distinction, making it an MMTP Order. The MMTP Order is submitted to the Exchange and it would trade with a resting quote from the same Market-Maker for 1000 shares offered at $1.20, then both the order to buy and the resting offer quote would be canceled. However, if the resting offer quote from the same Market-Maker was for only 600 shares, then 600 shares from the order to buy would be canceled (as would the resting quote), but the other 400 shares could trade with the resting offer interest of the other market participants.

At this time, the Exchange intends to identify an incoming MMTP Order as being for the same Market-Maker if the MMTP Order and resting quote or order share any of the following: (1) User acronym, (2) login ID, or (3) sub-account code. Each Market-Maker is assigned its own acronym (sometimes multiple acronyms). However, a Market-Maker may have multiple different login IDs or sub-account codes. A login ID is the session through which a Market-Maker routes orders to the Exchange. A Market-Maker may elect to use different login IDs to route different types of communications to the Exchange. For example, a Market-Maker may choose to use login ID #1 for all orders it sends to the Exchange and login ID #2 for all quotes it sends to the Exchange. Or the Market-Maker may be much more specific, and use different login IDs for different types of orders and quotes. A sub-account code is simply a field on each order or quote that lists the account into which a trade clears at the Options Clearing Corporation (''OCC''). A Market-Maker may have different sub-account codes for each trader it employs, so that the Market-Maker may track each trader's activity. Finally, Market-Makers sometimes use different acronyms but clear into the same accounts (thereby using the same sub-accounts codes).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

Allowing Market-Makers to designate orders as MMTP Orders is intended to allow firms to better manage order flow and prevent unwanted executions resulting from the interaction of executable buy and sell trading interest for the same Market-Maker, as well as prevent the potential for (or appearance of) ''wash sales'' that may occur as a result of the velocity of trading in today's high speed marketplace. When a Market-Maker is preparing to submit an order, the Market-Maker may not know whether or not his order is going to trade against his own resting quote. Further, many Market-Makers have multiple connections into the Exchange due to capacity- and speed-related demands. Orders routed by the same Market-Makers via different connections may, in certain circumstances, trade against each other. Finally, the Exchange notes that offering the MMTP modifiers will streamline certain regulatory functions by reducing false positive results that may occur on Exchange-generated wash trading surveillance reports when orders are executed by the same Market-Maker. For these reasons, the Exchange believes the MMTP Order provides Market-Makers enhanced order processing functionality to prevent potentially unwanted trades from occurring.

The proposed rule change is based on rule changes recently proposed by the Chicago Board Options Exchange, Inc. (''CBOE'') and C2 Options Exchange, Inc. (''C2'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act[6] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[7] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change advances these objectives by making available to Market-Makers a type of order that will assist Market-Makers in preventing unwanted executions against themselves.

The proposed rule change is based on rule changes recently proposed by the Chicago Board Options Exchange, Inc. (''CBOE'') and C2 Options Exchange, Inc. (''C2'').[9]

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)[10] of the Act and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6)[12] normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii)[13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay, as specified in Rule 19b–4(f)(6)(iii),[14] which would make the rule change effective and operative upon filing. As indicated above by the Exchange, the MMTP Order type is intended to prevent unwanted executions resulting from the interaction of executable buy and sell trading interest for the same Market-Maker in a manner that is consistent with other markets that have similar order types. Further, the Exchange stated that the rule is identical to those recently filed by CBOE and C2 (aside from CBOE and C2's added rule text for MMTP Orders subject to auction processes, which do not exist on C2)[15] and as a result it believes that the proposed rule change does not present any new, unique or substantive issues. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow the Exchange to implement the order type without delay and may assist with the maintenance of orderly markets. Accordingly, the Commission designates the proposed rule change operative upon filing with the Commission.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–102 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–CBOE–2011–102. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will

[5] *See* Securities Exchange Act Release No. 65379 (September 22, 2011), 76 FR 60108 (September 28, 2011) (SR–CBOE–2011–079) *and* Securities Exchange Act Release No. 65380 (September 22, 2011) 76 FR 60102 (September 28, 2011) (SR–C2–2011–017).

[6] 15 U.S.C. 78s(b)(1).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] *See* Note 5.

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] *Id.*

[15] *See* Note 5.

post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2011–102 and should be submitted on or before November 28, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28694 Filed 11–4–11; 8:45 am]

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[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[(Release No. 34–65663; File No. SR–FINRA–2011–035)]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, etc.

November 1, 2011.

Overview Information

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as modified by Partial Amendment No. 1, to Adopt FINRA Rules 2210 (Communications with the Public), 2212 (Use of Investment Companies Rankings in Retail Communications), 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings), 2214 (Requirements for the Use of Investment Analysis Tools), 2215 (Communications with the Public Regarding Security Futures), and 2216 (Communications with the Public About Collateralized Mortgage Obligations (CMOs)) in the Consolidated FINRA Rulebook.

I. Introduction

On July 14, 2011, the Financial Industry Regulatory Authority (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210–1 and 2210–3 through 2210–8 as FINRA Rules 2210 and 2212 through 2216, and to delete paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5) and 472.90, and Incorporated NYSE Rule Interpretations 472/01 and 472/03 through 472/11. The proposed rule change was published for comment in the **Federal Register** on August 3, 2011.[3] The Commission received nine comment letters in response to the proposed rule change.[4] On August 31, 2011, FINRA extended the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change, to November 1, 2011. On October 31, 2011, FINRA filed Partial Amendment No. 1 to the proposed rule change and a letter responding to comments.[5] The Commission is publishing this notice and order to solicit comments on Partial Amendment No. 1 to the proposed rule change from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposed rule change, as modified by Partial Amendment No. 1.

Institution of these proceedings, however, does not indicate that the Commission has reached any conclusions with respect to the proposed rule change, nor does it mean that the Commission will ultimately disapprove the proposed rule change. Rather, as discussed below, the Commission seeks additional input from interested parties on the issues presented by the proposed rule change, as modified by Partial Amendment No. 1, and on FINRA's Response Letter.

II. Description of the Proposed Rule Change and Summary of Comments

As part of the process of developing a new consolidated rulebook (''Consolidated FINRA Rulebook''), FINRA is proposing to adopt NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210–1 and 2210–3 through 2210–8 as FINRA Rules 2210 and 2212 through 2216 in the Consolidated FINRA Rulebook, and to delete paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5), and 472.90, and Incorporated NYSE Rule Interpretations 472/01 and 472/03 through 472/11. The proposed rule change would renumber NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210–1 and 2210–4 as FINRA Rule 2210, NASD Interpretive Material 2210–3 as FINRA Rule 2212, NASD Interpretive Material 2210–5 as FINRA Rule 2213, NASD Interpretive Material 2210–6 as FINRA Rule 2214, NASD Interpretive Material 2210–7 as FINRA

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 64984 (July 28, 2011), 76 FR 46870 (August 3, 2011) (Notice of Filing of SR–FINRA–2011–035) (''Notice of Filing''). The comment period closed on August 24, 2011.

[4] *See* letter from Oscar S. Hackett, General Counsel, BrightScope, Inc., dated August 23, 2011 (''BrightScope Letter''); letter from Alexander C. Gavis, Fidelity Investments, dated August 24, 2011 (''Fidelity Letter''); letter from David T. Bellaire, General Counsel and Director of Government Affairs, Financial Services Institute, dated August 24, 2011 (''FSI Letter''); letter from Dorothy M. Donohue, Senior Associate Counsel, Investment Company Institute, dated August 24, 2011 (''ICI Letter''); letter from Z. Jane Riley, Chief Compliance Officer, The Leaders Group, Inc., dated August 24, 2011 (''TLGI Letter''); letter from Peter J. Mougey, President, Public Investors Arbitration Bar Association, dated August 23, 2011 (''PIABA Letter''); letter from John Polanin and Clair Santaniello, Co-Chairs, Compliance and Regulatory Policy Committee 2011, Securities Industry and Financial Markets Association, dated August 25, 2011 (''SIFMA Letter''); letter from Sandra J. Burke, Principal, Vanguard, dated August 24, 2011 (''Vanguard Letter''); and letter from Yoon-Young Lee, WilmerHale, on behalf of Citigroup Global Markets Inc., Credit Suisse Securities (USA) LLC, Goldman, Sachs & Co., JP Morgan Securities Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co. LLC, and UBS Securities LLC, dated August 26, 2011 (''Wilmer Letter''). Comment letters are available at *http://www.sec.gov.*

[5] *See* letter from Joseph P. Savage, FINRA, to Elizabeth Murphy, Secretary, SEC, dated October 31, 2011 (''Response Letter''). The text of proposed Amendment No. 1 and FINRA's Response Letter are available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room. FINRA's Response Letter is also available on the Commission's Web site at *http://www.sec.gov.*

Rule 2215, and NASD Interpretive Material 2210–8 as FINRA Rule 2216.

NASD Rules 2210 and 2211, and the Interpretive Materials that follow Rule 2210, generally govern all FINRA members' communications with the public. Incorporated NYSE Rule 472 governs communications with the public of FINRA members that also are members of the New York Stock Exchange.

The proposed rule change would create a new FINRA Rule 2210 that would encompass, subject to certain changes, the provisions of current NASD Rules 2210 and 2211, NASD Interpretive Materials 2210–1 and 2210–4, and the provisions of Incorporated NYSE Rule 472 that do not pertain to research analysts and research reports. Each of the other Interpretive Materials that follow NASD Rule 2210 would receive its own FINRA rule number and would adopt the same communication categories used in FINRA Rule 2210.[6]

As discussed in the Notice of Filing, proposed FINRA Rule 2210 would replace the current six communication categories with three new categories: Institutional communication, retail communication, and correspondence, and would prescribe approval, review, recordkeeping, filing and content requirements to such communications.

In general, the commenters to the Notice of Filing supported the proposal. Commenters, however, raised concerns regarding various aspects of the proposed rules, including, among others:

- The scope of the definition of the term ''institutional investor'';[7]
- The circumstances in which an institutional communication could be deemed a retail communication (*e.g.,* when a member ''has reason to believe that the communication or any excerpt thereof will be forwarded or made available to any retail investor'');[8]
- The treatment of internal communications for education and training as institutional communications;[9]
- The requirements applicable to communications prepared by research department personnel;[10]
- The requirements to file with FINRA within 10 business days of first use certain retail communications (*e.g.,* communications concerning government securities, closed-end funds and any registered security that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency, that is not included in other filing requirements);[11]
- Disclosure requirements applicable to communications and public appearances that contain a recommendation (*e.g.,* the proposed category of associated persons whose financial interest would need to be disclosed);[12]
- The treatment of public appearances generally and, in particular, postings in online interactive fora;[13] and
- The exclusion from the filing requirement for certain prospectuses and offering documents.

FINRA responded to these and other comments in its Response Letter and filed Partial Amendment 1.[14]

III. Description of Partial Amendment No. 1

FINRA's proposed changes in response to comments, as set forth in Partial Amendment No. 1 are summarized below.

First, FINRA is proposing to amend proposed FINRA Rule 2210 to clarify that a member is required to have a principal approve a retail communication that is excepted from the definition of ''research report'' pursuant to NASD Rule 2711(a)(9)(A) if the retail communication makes any financial or investment recommendation.

Second, FINRA is proposing to eliminate the filing requirement for retail communications concerning government securities (as defined by Section 3(a)(42) of the Exchange Act).

Third, FINRA is proposing to amend proposed FINRA Rule 2210 to clarify that a comparative illustration of the mathematical principles of tax-deferred versus taxable compounding must disclose that ordinary income tax rates will apply to withdrawals from a tax-deferred investment.

Fourth, FINRA is proposing to modify the disclosure requirements for retail communications and public appearances that include a recommendation of securities. FINRA proposes to change the category of associated persons whose financial interest would have to be disclosed pursuant to paragraph (d)(7)(A)(ii) of proposed FINRA Rule 2210. As revised, a retail communication that includes a securities recommendation would have to disclose if the member or any associated person that is directly and materially involved in the preparation of the content of the communication has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest, unless the extent of the financial interest is nominal.

FINRA proposes a technical modification to the language in paragraph (d)(7)(A)(iii) of proposed FINRA Rule 2210 in order to make it consistent with the language in paragraph (d)(7)(A)(ii) of proposed FINRA Rule 2210, by changing the reference to ''any securities of the recommended issuer'' to ''any of the securities of the issuer whose securities are recommended.'' FINRA proposes to modify proposed paragraph 2210(d)(7)(D) to clarify that the disclosure requirements in proposed paragraph (d)(7)(A) and the provisions regarding past specific recommendations in proposed paragraph (d)(7)(C) do not apply to a communication that recommends only registered investment companies or variable insurance products; however, such communications still must have a reasonable basis for the recommendation. In addition, pursuant to proposed paragraph (d)(7)(B), a member must provide, or offer to furnish upon request, available investment information supporting the recommendation in such communications.

FINRA also proposes to revise the disclosure standards for public appearances that include securities recommendations. As revised, the requirements under proposed FINRA Rule 2210(f) would apply only to public appearances by associated persons (since members do not engage in public appearances except through their associated persons). An associated person making a public appearance would have to disclose, if applicable, his or her own financial interest in any of the securities of the issuer whose securities are recommended and the nature of the financial interest, unless the extent of the financial interest is nominal. The associated person also would have to disclose any actual, material conflict of interest of the associated person or member of which the associated person knows or has

[6] Proposed FINRA Rule 2211 (Communications With the Public About Variable Insurance Products), which would replace NASD Interpretive Material 2210–2, is the subject of a separate proposed rule change. *See* Securities Exchange Act Release No. 61107 (December 3, 2009), 74 FR 65180 (December 9, 2009) (Notice of Filing File No. SR–FINRA–2009–070).

[7] *See* Fidelity and SIFMA Letters, *supra* note 4.

[8] *See* FSI and SIFMA Letters, *supra* note 4.

[9] *See* SIFMA, ICI, Fidelity and Vanguard Letters, *supra* note 4.

[10] *See* SIFMA and Wilmer Letters, *supra* note 4.

[11] *See* SIFMA, TLGI and SIFMA Letters, *supra* note 4.

[12] *See* Fidelity, FSI, ICI, PIABA, SIFMA and Wilmer Letters, *supra* note 4.

[13] *See* Fidelity, ICI and SIFMA Letters, *supra* note 4.

[14] *See supra,* note 5.

reason to know at the time of the public appearance. These disclosure requirements would not apply to any public appearance by a research analyst for purposes of NASD Rule 2711 that includes all of the applicable disclosures required by that Rule. The disclosure requirements also would not apply to a recommendation of investment company securities or variable insurance products; provided, however, that the associated person must have a reasonable basis for the recommendation.

Fifth, FINRA is proposing to add paragraph (d)(8) to proposed FINRA Rule 2210, which would exclude from the content standards of proposed paragraph (d): Prospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC. FINRA also proposes to clarify that the content standards of paragraph (d) of proposed FINRA Rule 2210 do apply to an investment company prospectus published pursuant to Securities Act Rule 482 and a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).

IV. Proceedings To Determine Whether To Approve or Disapprove SR–FINRA–2011–035 and Grounds for Disapproval Under Consideration

In view of the issues raised by the proposal, the Commission has determined to institute proceedings pursuant to Section 19(b)(2) of the Act to determine whether to approve or disapprove FINRA's proposed rule change.[15] Institution of such proceedings appears appropriate at this time in view of the legal and policy issues raised by the proposal. As noted above, institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the proposed rule change and provide the Commission with arguments to support the Commission's analysis as to whether to approve or disapprove the proposal.

The Commission is asking that commenters address the changes that FINRA proposes in Partial Amendment No. 1, the comments received on the Notice of Filing, FINRA's Response Letter, in addition to any other comments they may wish to submit about the proposed rule change. The Commission requests comment, in particular, on the following aspects of the proposal, as modified by Partial Amendment No. 1:

(1) The scope of the definition of ''institutional investor'' for purposes of these rules;

(2) the ''reason to believe'' standard under Proposed Rule 2210(a)(4)(F), which provides that ''no member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to any retail investor;''

(3) the requirements applicable to internal communications, public appearances and postings in online interactive fora;

(4) the requirements applicable to communications prepared by research department personnel;

(5) the scope of the category of associated persons whose financial interests would have to be disclosed in a retail communication that includes a recommendation of securities; and

(6) the scope of the proposed exclusion from the content standards as set forth in proposed paragraph 2210(d)(8).

Pursuant to Section 19(b)(2)(B) of the Act,[16] the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 15A(b)(6) of the Act[17] requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The Commission believes FINRA's proposal raises questions as to whether it is consistent with the requirements of Section 15A(b)(6) of the Act, including whether FINRA's proposal, as amended, would prevent fraudulent and manipulative acts, promote just and equitable principles of trade, and protect investors and the public interest.

V. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any others they may have identified with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, as modified by Partial Amendment No. 1, is inconsistent with Section 15A(b)(6) or any other provision of the Act, or the rules and regulations thereunder.

Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[18]

Interested persons are invited to submit written data, views, and arguments by December 7, 2011 concerning Partial Amendment No. 1 and regarding whether the proposed rule change, as modified by Partial Amendment No. 1, should be approved or disapproved. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 45 days from publication in the **Federal Register**]. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2011–035 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2011–035. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

[15] 15 U.S.C. 78s(b)(2). Section 19(b)(2)(B) of the Act provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. The time for conclusion of the proceedings may be extended for up to an additional 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding or if the self-regulatory organization consents to the extension.

[16] 15 U.S.C. 78s(b)(2)(B).

[17] 15 U.S.C. 78*o*–3(b)(6).

[18] Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–FINRA–2011–035 and should be submitted on or before December 7, 2011. Rebuttal comments should be submitted by December 22, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28716 Filed 11–4–11; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[License No. 06/06–0335]

Escalate Capital Partners SBIC I, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Escalate Capital Partners, SBIC I, L.P., 300 W. 6th Street, Suite 2250, Austin, TX 78701, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 107.730). Escalate Capital Partners, SBIC I, L.P. proposes to provide debt security financing to SailPoint Technologies, Inc., 6034 West Courtyard Drive, Suite 309, Austin, TX 78730. The financing is contemplated to provide working capital and capital for acquisitions.

The financing is brought within the purview of § 107.730(a)(1) of the Regulations because AV–EC Partners I L.P., an Associate of Escalate Capital Partners, SBIC I, L.P., owns more than ten percent of SailPoint Technologies, Inc. Therefore, this transaction is considered a financing of an Associate requiring an exemption.

Notice is hereby given that any interested person may submit written comments on the transaction within fifteen days of the date of this publication to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

Dated: October 26, 2011.

Sean Greene,

Associate Administrator for Investment.

[FR Doc. 2011–28707 Filed 11–4–11; 8:45 am]

BILLING CODE 8025–01–M

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12822 and #12823]

Pennsylvania Disaster Number PA–00044

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the Commonwealth of Pennsylvania (FEMA–4030–DR), dated 09/12/2011.

Incident: Tropical Storm Lee.

Incident Period: 09/03/2011 through 10/15/2011.

Effective Date: 10/27/2011.

Physical Loan Application Deadline Date: 11/14/2011.

EIDL Loan Application Deadline Date: 06/12/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Presidential disaster declaration for the State of Pennsylvania, dated 09/12/2011 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties: (Physical Damage and Economic Injury Loans):

Huntingdon, Monroe.

Contiguous Counties: (Economic Injury Loans Only):

Pennsylvania: Bedford, Blair, Fulton, Pike.

New Jersey: Sussex.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–28697 Filed 11–4–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12776 and #12777]

New York Disaster Number NY–00108

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 8.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of New York (FEMA–4020–DR), dated 08/31/2011.

Incident: Hurricane Irene.

Incident Period: 08/26/2011 through 09/05/2011.

DATES: *Effective Date:* 10/28/2011.

Physical Loan Application Deadline Date: 12/15/2011.

EIDL Loan Application Deadline Date: 05/31/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of New York, dated 08/31/2011 is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 12/15/2011.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–28705 Filed 11–4–11; 8:45 am]

BILLING CODE 8025–01–P

[19] 17 CFR 200.30–3(a)(12); 17 CFR 200.30–3(a)(57).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12858 and #12859]

New York Disaster Number NY–00113

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 6.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of New York (FEMA–4031–DR), dated 09/23/2011.

Incident: Remnants of Tropical Storm Lee.

Incident Period: 09/07/2011 through 09/11/2011.

DATES: *Effective Date:* 10/27/2011.

Physical Loan Application Deadline Date: 11/22/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 06/25/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of New York, dated 09/23/2011, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Oneida.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–28706 Filed 11–4–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12824 and #12825]

New York Disaster Number NY–00110

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 7.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of New York (FEMA–4031–DR), dated 09/13/2011.

Incident: Remnants of Tropical Storm Lee.

Incident Period: 09/07/2011 through 09/11/2011.

DATES: *Effective Date:* 10/28/2011.

Physical Loan Application Deadline Date: 12/15/2011.

EIDL Loan Application Deadline Date: 06/13/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of New York, dated 09/13/2011 is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 12/15/2011.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–28704 Filed 11–4–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12848 and #12849]

Texas Disaster Number TX–00382

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 4.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Texas (FEMA–4029–DR), dated 09/21/2011.

Incident: Wildfires.

≤*Incident Period:* 08/30/2011 and continuing.

Effective Date: 10/25/2011.

Physical Loan Application Deadline Date: 11/21/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 06/21/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Texas, dated 09/21/2011, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Cass, Morris, Navarro, Panola.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–28701 Filed 11–4–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12901 and #12902]

Florida Disaster #FL–00064

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of FLORIDA dated 10/27/2011.

Incident: Severe Storms and Tornadoes.

Incident Period: 10/18/2011.

Effective Date: 10/27/2011.

Physical Loan Application Deadline Date: 12/27/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 07/27/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Broward.

Contiguous Counties:

Florida: Collier, Hendry, Miami-Dade, Palm Beach.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	5.000
Homeowners Without Credit Available Elsewhere	2.500
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	3.250
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 12901C and for economic injury is 129020.

The State which received an EIDL Declaration # is Florida.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: October 27, 2011.

Karen G. Mills,

Administrator.

[FR Doc. 2011–28702 Filed 11–4–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12904 and #12905]

Louisiana Disaster #LA–00043

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Louisiana (FEMA–4041–DR), dated 10/28/2011.

Incident: Tropical Storm Lee.

Incident Period: 09/01/2011 through 09/05/2011.

Effective Date: 10/28/2011.

Physical Loan Application Deadline Date: 12/27/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 07/30/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 10/28/2011, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Parishes: East Feliciana, Jefferson, Lafourche, Plaquemines, Saint Bernard, Saint Charles, Terrebonne, West Feliciana.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere	3.250
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 129048 and for economic injury is 129058.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–28703 Filed 11–4–11; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions to OMB-approved information collections and one new information collection request.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, *Attn:* Desk Officer for SSA, *Fax:* (202) 395–6974, *Email address: OIRA_Submission@omb.eop.gov;*

(SSA), Social Security Administration, DCRDP, *Attn:* Reports Clearance Officer, 107 Altmeyer Building, 6401 Security Blvd., Baltimore, MD 21235, *Fax No.:* (410) 966–2830, *Email address: OPLM.RCO@ssa.gov.*

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than January 6, 2012. Individuals can obtain copies of the collection instruments by calling the SSA Reports Clearance Officer at (410) 965–8783 or by writing to the above email address.

1. Homeless with Schizophrenia Presumptive Disability Pilot Demonstration—45 CFR 46.101(b)(5)—0960–NEW. The Federal Strategic Plan to Prevent and End Homelessness 2010 calls on Federal agencies to work in partnership with State and local governments and with the private sector to end homelessness. A specific objective of the Strategic Plan is to increase economic security by improving access to mainstream programs and services.

In response to and in support of the President's efforts to end homelessness, SSA has developed the Homeless with Schizophrenia Presumptive Disability Pilot Demonstration, which tests both administrative improvements to the Supplemental Security Income (SSI) application process and interventions that provide financial stability to individuals who are homeless. The pilot will test strategies that would remove the barriers homeless adult applicants with schizophrenia or schizoaffective disorder experience when completing the SSI application process.

SSA uses two key forms to conduct the demonstration: The Research Subject Information and Consent Form and the Schizophrenia Presumptive Disability Recommendation Form. The consent form provides assurances from the participants that they understand the demonstration project and voluntarily are consenting to participate in it. The Presumptive Disability Recommendation form, filled out by a medical authority, provides information on how the applicant meets the disability criteria necessary to qualify

for SSI benefits. SSA uses the information in making a presumptive disability determination. Respondents are homeless, adult SSI applicants with schizophrenia or schizoaffective disorder.

Type of Request: Request for a new information collection.

Form	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Consent Form	200	1	120	400
Presumptive Disability Recommendation Form	16	13	10	35
Totals	216	.....	.....	435

2. Partnership Questionnaire—20 CFR 404.1080–1082—0960–0025. SSA considers partnership income in determining entitlement to Social Security benefits. SSA uses information from Form SSA–7104 to determine several aspects of eligibility for benefits, including the accuracy of reported partnership earnings, the veracity of a retirement, and lag earnings. The respondents are applicants for, and recipients of, Title II Social Security Old Age, Survivors, and Disability Insurance benefits.

Type of Request: Revision of an OMB-approved information collection.

Collection instrument	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–7104	12,350	1	30	6,175

3. Statement of Funds You Provided to Another and Statement of Funds You Received—20 CFR 404.1520(b), 404.1571–.1576, 404.1584–.1593 and 416.971–.976—0960–0059. SSA uses Form SSA–821–BK to collect employment information to determine whether recipients have worked after becoming disabled and, if so, whether the work is substantial gainful activity. SSA field offices use form SSA–821–BK to obtain work information during the initial claims process, the continuing disability review process, and for SSI claims involving work issues. SSA's processing centers and the Office of Disability and International Operations use the form to obtain post-adjudicative work issues from recipients. SSA reviews and evaluates the data to determine if the applicant or recipient meets the disability requirements of the law. The respondents are applicants and recipients of Title II Social Security and SSI disability payments.

Type of Request: Revision of an OMB-approved information collection.

Collection instrument	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–821–BK	300,000	1	40	200,000

4. Application for Search of Census Records for Proof of Age—20 CFR 404.716—0960–0097. When preferred evidence of age is not available or the available evidence is not convincing, SSA may request the U.S. Department of Commerce, Bureau of the Census, to search its records to establish a claimant's date of birth. SSA collects information from claimants using the SSA–1535–U3 to provide the Census Bureau with sufficient identification information to allow an accurate search of census records. Additionally, the Census Bureau uses a completed, signed SSA–1535–U3 to bill SSA for the search. The respondents are applicants for Social Security benefits who need to establish their date of birth as a factor of entitlement.

Type of Request: Revision of an OMB-approved information collection.

Collection instrument	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–1535–U3	18,030	1	12	3,606

5. Modified Benefit Formula Questionnaire—Foreign Pension—0960–0561. SSA uses Form SSA–308 to determine exactly how much (if any) of a foreign pension may be used to reduce the amount of Title II Social Security retirement or disability benefits under the modified benefit formula. The respondents are applicants for Title II Social Security retirement or disability benefits who receive foreign pensions.

Type of Request: Revision of an OMB-approved information collection.

Collection instrument	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–308	13,452	1	10	2,242

6. Medical Source Statement of Ability To Do Work-Related Activities (Physical and Mental)—20 CFR 404.1512–404.1514, 404.912–404.914, 404.1517, 416.917, 404.1519–404.1520, 416.919–416.920, 404.946, 416.946, 404–1546—0960–0662. In some instances, when a claimant appeals a denied disability claim and the claimant's medical sources cannot or will not give the agency sufficient evidence to determine whether the claimant is disabled, SSA may ask the claimant to have a consultative examination at the agency's expense. The medical providers who perform these consultative examinations provide a statement on Forms HA–1151 and HA–1152 about the claimant's disability and ability to perform work-related activities. SSA uses the information to assess the work-related physical and mental capabilities of claimants who appeal SSA's previous determination on their issue of disability. The respondents are medical sources who provide reports based either on existing medical evidence or on consultative examinations.

Type of Request: Revision of an OMB-approved information collection.

Collection instrument	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
HA–1151	5,000	24	15	30,000
HA–1152	5,000	24	15	30,000
Totals	10,000			60,000

7. Medicare Subsidy Quality Review Forms—20 CFR 418(b)(5)—0960–0707. The *Medicare Modernization Act of 2003* mandated the creation of the Medicare Part D prescription drug coverage program and provides certain subsidies for eligible Medicare beneficiaries to help pay for the cost of prescription drugs. As part of its stewardship duties of the Medicare Part D subsidy program, SSA must conduct periodic quality review checks of the information Medicare beneficiaries report on their subsidy applications (Form SSA–1020). SSA uses the Medicare Quality Review program to conduct these checks. The respondents are applicants for the Medicare Part D subsidy whom SSA chose to undergo a quality review.

Type of Request: Revision of an OMB-approved information collection.

Form number and name	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–9301 (Medicare Subsidy Quality Review Case Analysis Questionnaire)	3,500	1	30	1,750
SSA–9302 (Notice of Quality Review Acknowledgement Form for those with Phones)	3,500	1	15	875
SSA–9303 (Notice of Quality Review Acknowledgement Form for those without Phones)	350	1	15	88
SSA–9304 (Checklist of Required Information; burden accounted for with forms SSA–9302, SSA–9303, SSA–9311, SSA–9314)				
SSA–9308 (Request for Information)	7,000	1	15	1,750
SSA–9310 (Request for Documents)	3,500	1	5	292
SSA–9311 (Notice of Appointment—Denial— Reviewer Will Call)	450	1	15	113
SSA–9312 (Notice of Appointment—Denial—Please Call Reviewer)	50	1	15	13
SSA–9313 (Notice of Quality Review Acknowledgement Form for those with Phones)	2,500	1	15	625
SSA–9314 (Notice of Quality Review Acknowledgement Form for those without Phones)	500	1	15	125
SSA–8510 (Authorization to the Social Security Administration to Obtain Personal Information)	3,500	1	5	292
Totals	24,850			5,923

8. Application to Collect a Fee for Payee Services—20 CFR 416.640(a) and 20 CFR 416.1103(f)—0960–0719. *Sections 205(j)(4)(A)* and *(B)* and *1631(a)(2)* of the Social *Security Act (Act)* allow SSA to authorize certain organizational representative payees to collect a fee for providing payee services. Before an organization may collect this fee, they complete and submit Form SSA–445. SSA uses the information to determine whether to authorize or deny permission to collect fees for payee services. The respondents are private sector businesses or State and local government offices applying to become fee-for-service organizational representative payees.

Type of Request: Revision of an OMB-approved information collection.

Collection instrument	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Private sector business	90	1	10	15
State/local government offices	10	1	10	2
Totals	100	.....	.....	17

II. SSA submitted the information collection below to OMB for clearance. Your comments regarding the information collection would be most useful if OMB and SSA receive them within 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than December 7, 2011. Individuals can obtain copies of the OMB clearance package by calling the SSA Reports Clearance Officer at (410) 965–8783 or by writing to the above email address.

Report on Individual with Mental Impairment—20 CFR 404.1513 & 416.913—0960–0058. SSA uses Form SSA–824 to obtain medical evidence from medical sources who have treated a Social Security disability claimant for a mental impairment. SSA uses the information to establish whether a claimant filing for disability benefits has a mental impairment that meets the statutory definition of disability in accordance with the *Social Security Act.* The respondents are mental impairment treatment providers.

Note: This is a correction notice. SSA published this information collection as an extension on August 1, 2011 at 76 FR 45902. Since we are revising the Privacy Act Statement, this is now a revision of an OMB-approved information collection. We are also updating the burden data.

Type of Request: Revision of an OMB-approved information collection.

Collection instrument	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–824	500	1	36	300

Dated: November 2, 2011.

Faye Lipsky,

Reports Clearance Officer, Center for Reports Clearance, Social Security Administration.

[FR Doc. 2011–28729 Filed 11–4–11; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 7679]

Culturally Significant Objects Imported for Exhibition

Determinations: ''Transition to Christianity: Art of Late Antiquity, 3rd–7th Century AD''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Transition to Christianity: Art of Late Antiquity, 3rd–7th Century AD,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Onassis Cultural Center, New York, NY, from on or about December 6, 2011, until on or about May 14, 2012, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: (202) 632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: October 28, 2011.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2011–28805 Filed 11–4–11; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 7677]

Exchange Visitor Program—Cap on Current Participant Levels and Moratorium on New Sponsor Applications for Summer Work Travel Program

AGENCY: Department of State.

ACTION: Notice Regarding the Summer Work Travel Program.

SUMMARY: Effective January 1, 2012, the Department is restricting the size of the Exchange Visitor Program (J–1visa) category of Summer Work Travel to 2011 actual participant levels. The Department is also announcing, effective immediately, a moratorium on designation of new Summer Work Travel sponsor organizations.

FOR FURTHER INFORMATION CONTACT: Rick A. Ruth, Deputy Assistant Secretary, Acting, Bureau of Educational and Cultural Affairs, U.S. Department of State, SA–5, Floor 5, 2200 C Street NW., Washington, DC 20522–0505; Tel: (202) 632–2805. Email: *JExchanges@state.gov.*

SUPPLEMENTARY INFORMATION: The Summer Work Travel (SWT) program allows foreign post-secondary students to come to the United States during their major academic break for a

maximum of four months to travel and work in largely unskilled positions. The program has been in operation since 1963 and helps the Department reach a segment of the youth demographic that often does not have the means to visit the United States unless they can work to defray their costs. In 2011, approximately 103,000 foreign students will have participated in the SWT program. Roughly one million foreign post-secondary students have participated in the past decade. The SWT program supports public diplomacy efforts by fostering constructive, personal ties with foreign youth and offering them a positive view of the United States that they can then share in their home countries.

The Department began an ongoing, comprehensive review of the Summer Work Travel program in spring 2010, which has resulted in significant changes to the existing regulations that govern administration of the program. A pilot program that placed more stringent requirements on participants from six countries (Russia, Ukraine, Bulgaria, Belarus, Moldova and Romania) was implemented for the 2011 season. A program-wide Interim Final Rule, which took effect on July 15, 2011: (a) Strengthens sponsor oversight requirements with respect to both program participants for whom sponsors are responsible and the third parties that sponsors rely upon to assist them in administering their programs (i.e., U.S. employers and foreign agents); (b) requires that participants from non-Visa Waiver Program countries be pre-placed in a job before the Form DS–2019 is issued; (c) requires sponsors to fully vet employers and all SWT job offers; and, (d) requires sponsors to contact current program participants on a monthly basis to monitor their welfare and whereabouts.

Yet, despite these new regulations, the number of program complaints received this year continues to remain unacceptably high and includes, among other issues, reports of improper work placements, fraudulent job offers, job cancellations upon participant arrival in the United States, inappropriate work hours, and problems regarding housing and transportation.

To ensure that these issues are appropriately addressed, the Department is continuing and augmenting its review of the Summer Work Travel program and its governing regulations. Until the Department completes its review and implements the next steps, currently designated sponsors may continue to operate under their present designations and current regulations at 22 CFR Part 62; however, until further notice, SWT program sponsors in business for the full 2011 calendar year will not be permitted to expand their number of program participants beyond their actual total 2011 participant program size. No new applications from prospective sponsors for SWT program designation will be accepted at this time.

Dated: October 31, 2011.

Rick A. Ruth,

Deputy Assistant Secretary for Private Sector Exchange, Acting, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2011–28810 Filed 11–4–11; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 7678]

Bureau of International Security and Nonproliferation; Termination of Chemical and Biological Weapons (CBW) Proliferation Sanctions Against a Foreign Person

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: The United States Government has decided to terminate sanctions imposed on a foreign person who had engaged in CBW proliferation activities that required the imposition of sanctions pursuant to the Arms Export Control Act and the Export Administration Act of 1979.

DATES: *Effective Date:* Upon publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Pamela K. Durham, Office of Missile, Biological, and Chemical Nonproliferation, Bureau of International Security and Nonproliferation, Department of State, Telephone (202) 647–4930.

SUPPLEMENTARY INFORMATION: Pursuant to Sections 81(d) of the Arms Export Control Act (22 U.S.C. 2798(d)) and Section 11C(d) of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2410c(d)), the Under Secretary of State for Arms Control and International Security determined and certified to Congress that reliable information indicated that the following foreign person has ceased to aid or abet any foreign government, project, or entity in its efforts to acquire chemical or biological weapons capability:

Gerhard Merz

This determination and certification terminates the sanctions imposed on this foreign person in 1994 pursuant to Section 81(a) and (c) of the Arms Export Control Act and Section 11C(a) and (c) of the Export Administration Act. (Volume 59 FR Public Notice 2143)

Dated: November 1, 2011.

Thomas M. Countryman,

Assistant Secretary of State for International Security and Nonproliferation.

[FR Doc. 2011–28808 Filed 11–4–11; 8:45 am]

BILLING CODE 4710–27–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Dispute No. WTO/DS422]

WTO Dispute Settlement Proceeding Regarding United States—Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades From China

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (''USTR'') is providing notice that the People's Republic of China has requested the establishment of a dispute settlement panel under the *Marrakesh Agreement Establishing the World Trade Organization* (''WTO Agreement''). That request may be found at *www.wto.org* contained in a document designated as WT/DS422/3. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before December 7, 2011, to be assured of timely consideration by USTR.

ADDRESSES: Public comments should be submitted electronically to *www.regulations.gov,* docket number USTR–2011–0002. If you are unable to provide submissions by *www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission.

If (as explained below) the comment contains confidential information, then the comment should be submitted by fax only to Sandy McKinzy at (202) 395–3640.

FOR FURTHER INFORMATION CONTACT: Jared Wessel, Assistant General Counsel, Office of the United States Trade Representative, 600 17th Street NW., Washington, DC 20508, (202) 395–3150.

SUPPLEMENTARY INFORMATION: Section 127(b) of the Uruguay Round Agreements Act (''URAA'') (19 U.S.C. 3537(b)(1)) requires that notice and opportunity for comment be provided

after the United States submits or receives a request for the establishment of a WTO dispute settlement panel. Consistent with this obligation, USTR is providing notice that a dispute settlement panel has been established pursuant to the WTO Dispute Settlement Understanding (''DSU''). The panel will hold its meetings in Geneva, Switzerland.

Major Issues Raised by China

On December 8, 2004, the U.S. Department of Commerce published in the **Federal Register** notice of its affirmative final less-than-fair-value (''LTFV'') determination in the antidumping investigation concerning certain frozen and canned warmwater shrimp from China (69 FR 70997). On February 1, 2005, the Department of Commerce published notice of an amended final LTFV determination, along with an antidumping duty order (70 FR 5149). That amended final LTFV determination has been subsequently amended. On May 24, 2011, the Department of Commerce published notice of an amended final LTFV determination pursuant to a court decision (76 FR 30100). The latter two notices contain the most recent margins of LTFV sales.

On May 22, 2006, the Department of Commerce published in the **Federal Register** notice of its affirmative final LTFV determination in the antidumping investigation concerning diamond sawblades and parts thereof from China (71 FR 29303). On June 22, 2006, the Department of Commerce published notice of an amended final LTFV determination (71 FR 35864) and on November 4, 2009 the Department published the antidumping duty order (74 FR 57145). The latter notice contains the most recent margins of LTFV sales.

In its request for the establishment of a panel, China alleges that the Department of Commerce improperly calculated margins of dumping by ''zeroing'' so-called ''negative dumping margins.'' Based on the use of zeroing, China alleges that the final LTFV determinations and the antidumping duty orders are inconsistent with the first sentence of Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. In this regard, on March 6, 2006, the Department of Commerce announced that it will no longer use ''zeroing'' when making average-to-average comparisons in an antidumping investigation. *See* 71 FR 11189.

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons may submit public comments electronically to *www.regulations.gov* docket number USTR–2011–0002. If you are unable to provide submissions by *www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission.

To submit comments via *www.regulations.gov,* enter docket number USTR–2011–0002 on the home page and click ''search''. The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the search-results page, and click on the link entitled ''Submit a Comment.'' (For further information on using the *www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on ''How to Use This Site'' on the left side of the home page.)

The *www.regulations.gov* site provides the option of providing comments by filling in a ''Type Comments'' field, or by attaching a document using an ''upload file'' field. It is expected that most comments will be provided in an attached document. If a document is attached, it is sufficient to type ''See attached'' in the ''Type Comments'' field.

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and the submission must be marked ''Business Confidential'' at the top and bottom of the cover page and each succeeding page. Any comment containing business confidential information must be submitted by fax to

Sandy McKinzy at (202) 395–3640. A non-confidential summary of the confidential information must be submitted to *www.regulations.gov.* The non-confidential summary will be placed in the docket and open to public inspection.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter—

(1) Must clearly so designate the information or advice;

(2) Must clearly mark the material as ''Submitted In Confidence'' at the top and bottom of the cover page and each succeeding page; and

(3) Must provide a non-confidential summary of the information or advice. Any comment containing confidential information must be submitted by fax. A non-confidential summary of the confidential information must be submitted to *www.regulations.gov.* The non-confidential summary will be placed in the docket and open to public inspection.

Pursuant to section 127(e) of the Uruguay Round Agreements Act (19 U.S.C. 3537(e)), USTR will maintain a docket on this dispute settlement proceeding accessible to the public at *www.regulations.gov,* docket number USTR–2011–0002. The public file will include non-confidential comments received by USTR from the public with respect to the dispute. If a dispute settlement panel is convened or in the event of an appeal from such a panel, the U.S. submissions, any non-confidential submissions, or non-confidential summaries of submissions, received from other participants in the dispute, will be made available to the public on USTR's Web site at *www.ustr.gov,* and the report of the panel, and, if applicable, the report of the Appellate Body, will be available on the Web site of the World Trade Organization, *www.wto.org.* Comments open to public inspection may be viewed on the *www.regulations.gov* Web site.

William Busis,

Deputy Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. 2011–28680 Filed 11–4–11; 8:45 am]

BILLING CODE 3190–W2–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Farm-to-Market 1626 in Texas

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for judicial review of actions by FHWA and other Federal agencies.

SUMMARY: This notice announces actions taken by the FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. 139(l)(1). The

actions relate to a proposed highway project, Farm-to-Market (FM) 1626, from Ranch-to-Market (RM) 967 to Brodie Lane in Hays and Travis Counties, Texas. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before May 5, 2012. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Mr. Salvador Deocampo, District Engineer, Texas Division, Federal Highway Administration, 300 East 8th Street, Room 826 Austin, Texas 78701; telephone: (512) 536–5950; email: *Salvador.Deocampo@dot.gov.* The FHWA Texas Division Office's normal business hours are 8 a.m. to 5 p.m. (central time) Monday through Friday. You may also contact Mark A. Marek, P.E., Interim Director Environmental Affairs Division, Texas Department of Transportation (TxDOT), 118 E. Riverside Drive, Austin, Texas 78704; telephone: (512) 416–2653; email: *mark.marek@txdot.gov.* The Texas Department of Transportation normal business hours are 8 a.m. to 5 p.m. (central time) Monday through Friday.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the following highway project in the State of Texas: Farm-to-Market (FM) 1626 from Ranch-to-Market (RM) 967 to Brodie Lane in Hays and Travis Counties; Project Reference Number: TxDOT CSJ: 1539–01–005, 1539–02–018, and 1539–02–028. The proposed improvements would consist of upgrading FM 1626 by adding an additional travel lane in each direction, a continuous center turn lane, and 4-foot shoulders. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the documented Environmental Assessment (EA), with a Finding of No Significant Impact (FONSI) issued October 19, 2011 and in other documents in the FHWA administrative record. The EA, FONSI, and other documents in the FHWA administrative record file are available by contacting the FHWA or the TxDOT at the addresses provided above.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321 *et seq.*]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [23 U.S.C. 138 and 49 U.S.C. 303].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)]; and, Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470]; Archaeological Resources Protection Act of 1979 [16 U.S.C. 470]; Archaeological and Historical Preservation Act [16 U.S.C. 469].

6. *Social and Economic:* Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000(d) *et seq.*]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act [33 U.S.C. 1251–1342]; Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604].

8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11514 Protection and Enhancement of Environmental Quality.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1).

Issued on: October 31, 2011.

Achille Alonzi,

Assistant Division Administrator, Austin, Texas.

[FR Doc. 2011–28686 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FRA–2011–0067]

Notice of Request for the Revision of Currently Approved Information Collection

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Federal Transit Administration (FTA) to request the Office of Management and Budget (OMB) to approve the revision of the currently approved information collection: 49 U.S.C. 5335(a) and (b) National Transit Database (NTD).

DATES: Comments must be submitted before January 6, 2012.

ADDRESSES: To ensure that your comments are not entered more than once into the docket, submit comments identified by the docket number by only one of the following methods:

1. *Web site: www.regulations.gov.* Follow the instructions for submitting comments on the U.S. Government electronic docket site. (**Note:** The U.S. Department of Transportation's (DOT's) electronic docket is no longer accepting electronic comments.) All electronic submissions must be made to the U.S. Government electronic docket site at www.regulations.gov. Commenters should follow the directions below for mailed and hand-delivered comments.

2. *Fax:* 202–366–7951.

3. *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.

4. *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

Instructions: You must include the agency name and docket number for this notice at the beginning of your comments. Submit two copies of your comments if you submit them by mail. For confirmation that FTA has received your comments, include a self-addressed stamped postcard. Note that all comments received, including any personal information, will be posted and will be available to Internet users, without change, to *www.regulations.gov.* You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000, (65 FR 19477), or you may visit *www.regulations.gov.* Docket: For access to the docket to read background documents and comments received, go to *www.regulations.gov* at any time. Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140,

Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: John D. Giorgis, National Transit Database Program Manager, FTA Office of Budget and Policy, (202) 366–5430, or email: *john.giorgis@dot.gov.*

SUPPLEMENTARY INFORMATION: Interested parties are invited to send comments regarding any aspect of this information collection, including: (1) The necessity and utility of the information collection for the proper performance of the functions of the FTA; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection.

Title: 49 U.S.C. 5335(a) and (b) National Transit Database.

(OMB Number: 2132–0008).

Background: 49 U.S.C. 5335(a) and (b) requires the Secretary of Transportation to maintain a reporting system, using a uniform system of accounts, to collect financial and operating information from the nation's public transportation systems. Congress created the NTD to be the repository of transit data for the nation to support public transportation service planning. FTA has established the NTD to meet these requirements, and has collected data for over 30 years. FTA continues to seek ways to reduce the burden of NTD reporting, most recently introducing its new Sampling Manual in 2010 to reduce the burden of passenger mile sampling and introducing its new Small Systems Waiver in 2011 to reduce the reporting burden on small transit systems.

The NTD is comprised of four modules, Rural, Annual, Monthly, and Safety & Security.

NTD Rural Module: State DOTs and tribal governments participating in the Tribal Transit Program.

Estimated Annual Burden: Currently FTA receives reports from 54 State and Territorial DOTs, and from 56 Tribal Transit grant recipients. Combined, these States and Tribes report on behalf of approximately 1,450 subrecipients from FTA's Rural (Section 5311) Formula Program. For each subrecipient, the State or Tribe provides identifying information, sources of operating funds, sources of capital funds, vehicle revenue miles, vehicle revenue hours, and unlinked passenger trips. Additionally, a revenue vehicle inventory is reported, as well as total fatalities, injuries, and safety incidents for the year. FTA estimates that it takes approximately 20 hours to report on behalf of each subrecipient, including the time needed for the subrecipient to gather the information and report it to its State DOT, the time for the State DOT to assemble the data and submit it to FTA, and the time to respond to validation questions from FTA about the data.

Estimated Total Annual Burden: 29,000 hours.

Frequency: Annual reports.

NTD Annual Module—Small Systems Waiver: FTA expects about 300 transit systems with 30 or fewer vehicles to claim a Small Systems Waiver.

Estimated Annual Burden: FTA provides reduced reporting requirements to urbanized area transit systems with 30 or fewer vehicles. These systems are exempt from sampling for passenger miles and report only summary financial and operating statistics compared to full reporters in urbanized areas, similar to what is required of the rural subrecipients. Additionally, they also report contact information, funding allocation information, a revenue vehicle inventory, the number of stations and maintenance facilities, and total injuries, fatalities, and safety incidents. The reports are also required to be reviewed by an auditor and certified by the CEO. Systems with this waiver are also exempt from the Monthly and Safety & Security Modules. FTA estimates that completing a report for a Small Systems Waiver requires approximately 27 hours, including time to assemble the information and respond to validation questions from FTA about the report.

Estimated Total Annual Urban Burden: 8,100 hours.

Frequency: Annually.

NTD Annual Module—Full Reports: FTA expects about 400 transit systems to file complete reports, including 10 reports that represent a consolidated report from numerous small systems.

Estimated Annual Burden: The Full Report to the Annual Module is comprehensive. Basic contact information, as well as information on subrecipients and purchased transportation contracts must be provided. Sources of funds for operating expenses and capital expenses must be provided, as well as detailed operating and capital expenses for each mode by function and object class. Key service data collected includes vehicle revenue miles, vehicle revenue hours, unlinked passenger trips, and passenger miles traveled; these must be provided by average weekday, average Saturday, average Sunday, and as an annual total. Most systems that do not inherently collect passenger mile information (such as a ferryboat or commuter rail) must conduct random sampling for passenger mile information. Large systems with more than 100 vehicles are required to sample for passenger miles every year, whereas smaller systems are only required to sample every third year. A comprehensive revenue vehicle inventory is collected, as well as information on fixed guideway mileage, passenger stations, maintenance facilities, fuel consumption, employee hours, and maintenance breakdowns. Reports are also required to be reviewed by an auditor and certified by the system CEO. Approximately 100 large systems are required to sample for passenger miles each year, while approximately 300 small systems are able to sample every three years. FTA estimates that it takes approximately 340 hours per year to sample for passenger miles, which is amortized over three years for small systems. FTA estimates that completing the remaining financial, operating, resource, and capital asset information requires approximately 200 hours per year per transit system, including gathering the information, completing the forms, and responding to validation questions.

Estimated Total Burden: 210,000 hours.

Frequency: Annually.

NTD Monthly Module: FTA expects about 450 transit systems to report to the Monthly Module.

Estimated Annual Burden: Each month, vehicle revenue miles, vehicle revenue hours, unlinked passenger trips, and vehicles operated in maximum service are submitted to the Monthly Module. FTA estimates that it takes approximately 4 hours each month for each system to report the data, including collecting and assembling the data for each mode, filling out the form, and responding to any validation questions in regards to the data.

Estimated Total Annual Urban Burden: 19,200 hours.

Frequency: Monthly.

NTD Safety & Security Module: FTA expects about 450 transit systems to report to the Safety & Security Module.

Estimated Annual Burden: Each system provides an annual report on the total number of security personnel, and an annual CEO certification of the safety data. Each month, systems provide a summary report of all minor fires and all incidents resulting in single-person injuries due to slips, falls, or electrical shocks. Additionally, systems must provide a detailed report within 30 days

of any incident involving one or more fatalities, one or more injuries, or total property damage in excess of $25,000. FTA currently receives about 5,000 major incident reports per year, and estimates that it takes on average about 2 hours to collect data for each incident, enter it into the NTD, and respond to any validation question. Additionally, FTA estimates that each of the 450 full reporters spend on average one hour each month completing the minor incident summary reports.

Estimated Total Annual Urban Burden: 14,800 hours.

Frequency: Monthly.

Total Annual NTD Burden: 281,100 hours.

Issued: November 2, 2011.

Ann M. Linnertz,

Associate Administrator for Administration.

[FR Doc. 2011–28789 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

FY 2011 Discretionary Livability Funding Opportunity; Section 5309 Bus and Bus Facilities Livability Initiative Program Grants and Section 5339 Alternatives Analysis Program

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: FTA Livability Initiative Program Funds: Announcement of Project Selections.

SUMMARY: The U.S. Department of Transportation's (DOT) Federal Transit Administration (FTA) announces the selection of projects funded under two discretionary programs: Bus and Bus Facilities and Alternatives Analysis, in support of DOT's Livability Initiative, which was announced in the Discretionary Livability Funding Opportunity notice of funding availability on June 27, 2011. The Bus Livability program makes funds available to public transit providers to finance capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities, including programs of bus and bus-related projects for assistance to subrecipients that are public agencies, private companies engaged in public transportation, or private non-profit organizations. The Alternatives Analysis program makes funds available to States, authorities of States, metropolitan planning organizations, and local governmental authorities to develop alternatives analyses. The Alternatives Analysis Program assists potential sponsors of major transit capital investments (''New Starts'' and ''Small Starts'' projects) in the evaluation of all reasonable modal and multimodal alternatives and general alignment options to address transportation needs in a defined travel corridor. Through these funding awards, FTA will support a limited number of alternatives analyses, or technical work conducted as part of proposed or on-going alternatives analyses, that seek to advance major transit investments that foster the six livability principles of the DOT–HUD–EPA Partnership for Sustainable Communities.

FOR FURTHER INFORMATION CONTACT: Successful and unsuccessful applicants should contact the appropriate FTA Regional office (Appendix) for specific information regarding applying for the funds or proposal specific questions. For general program information on the Bus and Bus Facilities Program, contact Samuel Snead, Office of Program Management, at (202) 366–2053, email: *samuel.snead@dot.gov,* or Kimberly Sledge, Office of Program Management, at (202) 366–2053, email: *kimberly.sledge@dot.gov.* For questions about the Alternatives Analysis program, contact Kenneth Cervenka, Office of Planning and Environment, at (202) 493–0512, email: *kenneth.cervenka@dot.gov.* A TDD is available at 1 (800) 877–8339 (TDD/FIRS).

SUPPLEMENTARY INFORMATION:

Bus Livability Program: A total of at least $150 million was available for FTA's Bus Livability Program. A total of 241 applicants requested $1.2 billion, indicating significant demand for funds. Project proposals were evaluated based on the criteria detailed in the June 27, 2011 Notice of Funding Availability. The projects selected and shown in Table 1 will provide mobility choices, improve economic competitiveness, support existing communities, create partnerships and enhance the value of communities and neighborhoods. Funds must be used for the eligible purposes defined under 49 U.S.C. 5309(b)(3) and consistent with the competitive proposal. In selecting projects for funding using Bus Program funds, FTA ensured that at least 5.5 percent of the FY 2011 Section 5309 funds, or $53.5 million, is being allocated to projects that are not in urbanized areas. Additionally, at least $35 million is being allocated for intermodal terminal projects.

Alternatives Analysis: A total of $25 million was available for FTA's Alternatives Analysis Program. A total of $60.8 million was requested for 71 projects, indicating significant demand for funds. Project proposals were evaluated based on the criteria detailed in the June 27, 2011 Notice of Funding Availability. The proposals selected and shown in Table 2 will advance proposed transit investments that would provide more transportation choices, improve economic competitiveness, support existing communities, create partnerships and enhance the value of communities and neighborhoods. Funds must be used for the eligible purposes defined under 49 U.S.C. 5309(a)(1) and consistent with the competitive proposal.

Project Implementation: Grantees selected for competitive discretionary funding should work with their FTA regional office to finalize the grant application FTA's Transportation Electronic Award Management system (TEAM) for the projects identified in the attached table and so that funds can be obligated expeditiously. In cases where the allocation amount is less than the proposer's requested amount, grantees should work with the regional office to reduce scope or scale the project such that a complete phase or project is accomplished. A discretionary project identification number has been assigned to each project for tracking purposes and must be used in the TEAM application. Selected projects have pre-award authority as of October 17, 2011. Additionally, for the Bus Livability projects, although several projects contained related housing or livable communities' initiatives, FTA funds may only be used for eligible purposes defined under 49 U.S.C. 5309(b)(3) and described in FTAC.9030.1C. For any Bus Livability projects that will be implemented as a joint-development project, please also refer to the agency's joint-development guidance found in 72 FR 5788 (Feb. 7, 2007) for more information. Post-award reporting requirements include submission of the Financial Federal Report and Milestone reports in TEAM as appropriate (see FTA.C.5010.1D).

The grantee must comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out the project supported by the FTA grant. FTA emphasizes that grantees must follow all third-party procurement guidance, as described in FTA.C.4220.1F. Funds allocated in this announcement must be obligated in a grant by September 30, 2014.

Issued in Washington, DC, this 2nd day of November 2011.

Peter Rogoff,

Administrator.

Appendix

FTA REGIONAL AND METROPOLITAN OFFICES

Mary E. Mello, Deputy Regional Administrator, Region 1–Boston, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142–1093, Tel. (617) 494–2055 States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.	Robert C. Patrick, Regional Administrator, Region 6–Ft. Worth, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, Tel. (817) 978–0550 States served: Arkansas, Louisiana, Oklahoma, New Mexico and Texas.
Anthony Carr, Acting Regional Administrator, Region 2–New York, One Bowling Green, Room 429, New York, NY 10004–1415, Tel. (212) 668–2170 States served: New Jersey, New York. New York Metropolitan Office, Region 2–New York, One Bowling Green, Room 428, New York, NY 10004–1415, Tel. (212) 668–2202	Mokhtee Ahmad, Regional Administrator, Region 7–Kansas City, MO, 901 Locust Street, Room 404, Kansas City, MO 64106, Tel.(816) 329–3920 States served: Iowa, Kansas, Missouri, and Nebraska.
Brigid Hynes-Cherin, Acting Regional Administrator, Region 3–Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. (215)–656–7100 States served: Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and District of Columbia Washington D.C. Metropolitan Office, 1990 K St NW Suite 510, Washington, DC 20006, Tel: (202) 219–3562	Terry Rosapep, Regional Administrator, Region 8–Denver, 12300 West Dakota Ave., Suite 310, Lakewood, CO 80228–2583, Tel. (720) 963–3300 States served: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
Yvette Taylor, Regional Administrator, Region 4–Atlanta, 230 Peachtreet Street NW., Suite 800, Atlanta, GA 30303, Tel. (404) 865–5600 States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and Virgin Islands	Leslie T. Rogers, Regional Administrator, Region 9–San Francisco, 201 Mission Street, Room 1650, San Francisco, CA 94105–1926, Tel. (415) 744–3133 States served: American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands. Los Angeles Metropolitan Office, Region 9–Los Angeles, 888 S. Figueroa Street, Suite 1850, Los Angeles, CA 90017–1850, Tel. (213) 202–3952
Marisol Simon, Regional Administrator, Region 5–Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. (312) 353–2789 States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin Chicago Metropolitan Office, Region 5–Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. (312) 353–2789	Rick Krochalis, Regional Administrator, Region 10–Seattle, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174–1002, Tel. (206) 220–7954 States served: Alaska, Idaho, Oregon, and Washington.

BILLING CODE 4910–57–P

Table I

BUS LIVABILITY PROJECT SELECTIONS

State	Project ID	Recipient	Project Description	Allocation
CA	D2011-BLIV-001	Los Angeles County Metropolitan Transportation Authority	Patsaouras Plaza Busway Station	$9,679,000
CA	D2011-BLIV-002	Omnitrans	San Bernardino Transit Center (Bus Station Portion of Project)	3,000,000
CA	D2011-BLIV-003	Orange County Transportation Authority	Anaheim Regional Transportation Intermodal Center (ARTIC) ($7,500,000); Bus Stop Solar Lighting ($80,000); Bike Share Station Pilot Program ($768,000)	8,348,000
CA	D2011-BLIV-004	San Mateo County Transit District	San Carlos Multi-Modal Transit Center Project	3,500,000
CA	D2011-BLIV-005	Victor Valley Transit Authority	Inland Empire Vanpool Program - Victor Valley Phase	1,491,200
CT	D2011-BLIV-006	Greater Hartford Transit District	Pedestrian improvements to Hartford's Union Station Transportation Center	1,692,107
FL	D2011-BLIV-007	Central Florida Regional Transportation Authority (LYNX)	Construction of Kissimmee Intermodal Transfer Center	2,000,000
FL	D2011-BLIV-008	City of Gainesville	Gainesville Regional Transit System Facility Expansion	9,000,000
FL	D2011-BLIV-009	South Florida Regional Transportation Authority	Alternative Fuel Bus Shuttle Fleet	4,556,000
ID	D2011-BLIV-010	Idaho Department of Transportation	Downtown Ketchum Intermodal Center ($200,000); East Fork Bus Shelter ($28,000)	228,000
IL	D2011-BLIV-011	Chicago Transit Authority	Wilson Intermodal Accessibility Project	6,000,000
IL	D2011-BLIV-012	Rock Island County Metropolitan Mass Transit District	Construction of New Rock Island Transportation Hub	2,082,400
IL	D2011-BLIV-013	Springfield Mass Transit District	Integration of Technology in Mainline Operations	866,000
IN	D2011-BLIV-014	Bloomington Public Transportation Corporation	Purchase Bicycle Lockers for New Downtown Passenger Transfer Station	24,900
IN	D2011-BLIV-015	Fort Wayne Public Transportation Corporation	Bus transit accessibility improvements and pedestrian connectivity (Lake Avenue Corridor)	152,784
IA	D2011-BLIV-016	City of Coralville	Construction of Coralville Intermodal Facility	4,000,000
KS	D2011-BLIV-017	Kansas City Area Transportation Authority	Bus Stop and Access Improvements (Wyandotte County) ($240,000); Bus Basic Passenger Infrastructure Project (Johnson County) ($376,000)	616,000
KY	D2011-BLIV-018	Kentucky Transportation Cabinet	Murray Calloway Transit Authority Bikeway and Sidewalk Improvements	1,007,200

State	Project ID	Recipient	Project Description	Allocation
ME	D2011-BLIV-019	Maine Department of Transportation	Sanford Transportation Center Project ($1,219,000); Washington-Hancock Community Agency Pilot Projects - Van purchase ($77,978)	1,296,978
MD	D2011-BLIV-020	Maryland Transit Administration	Highlandtown Transit Bus Corridor Improvement Project	411,500
MA	D2011-BLIV-021	Massachusetts Department of Transportation	Springfield Union Station Intermodal Transportation Center	6,000,000
MI	D2011-BLIV-022	Ann Arbor Transportation Authority	Re-Imagine Washtenaw - Purchase of Clean Diesel Buses with Hybrid-Electric components	2,625,000
MI	D2011-BLIV-023	City of Grand Haven/Harbor Transit	Vehicle and Equipment Purchase for Service Expansion and Improved Efficiencies	607,200
MI	D2011-BLIV-024	Mass Transportation Authority	Purchase Over-the-Road CNG Coaches	3,000,000
MI	D2011-BLIV-025	Suburban Mobility Authority for Regional Transportation	Modern Hybrid Biodiesel/Electric Fixed-Route Bus Replacement	4,995,000
MN	D2011-BLIV-026	Metropolitan Council/Metro Transit	Downtown Saint Paul Passenger Facility Improvements	2,602,400
MO	D2011-BLIV-027	Bi-State Development Agency	Purchase of Articulated Buses and Related Equipment	2,000,000
MO	D2011-BLIV-028	Kansas City Area Transportation Authority	Bus Stop Access Improvements ($100,000); Bus Stop Access Improvements ($100,000); Antioch Transit Center Improvements ($100,000)	300,000
MT	D2011-BLIV-029	Missoula Urban Transportation District	Bike-On Transit Program Enhancements	133,744
MT	D2011-BLIV-030	Montana Department of Transportation	Big Sky Transportation District Skyline Van Pool Service ($177,600); Missoula Ravalli Transportation Management Association Van Pool Program ($112,000)	289,600
NE	D2011-BLIV-031	Transit Authority of the City of Omaha	Multimodal Transit Facility (Crossroads Area)	2,155,024
NJ	D2011-BLIV-032	New Jersey Transit Corporation	Ground Transportation Improvements at Frank R. Lautenberg Intermodal Facility	4,662,000
NY	D2011-BLIV-033	Capital District Transportation Authority	BusPlus - Completion of Station Construction, Passenger Amenities, and Rrelated Equipment	5,500,000
NY	D2011-BLIV-034	New York City Department of Transportation	BUS for ALL Project - Bus Stop Access Improvements ($8,446,224); Broadway Junction Intermodal Enhancements ($3,406,400)	11,852,624
NY	D2011-BLIV-035	Niagara Frontier Transportation Authority	Niagara Street Corridor Project	3,577,600

State	Project ID	Recipient	Project Description	Allocation
OH	D2011-BLIV-036	Greater Cleveland Regional Transit Authority	Clifton Boulevard Enhancement Project	3,000,000
OK	D2011-BLIV-037	Choctaw Nation of Oklahoma	Van Purchase and Replacement	233,600
OR	D2011-BLIV-038	Salem Area Mass Transit District	Regional Transit Center Development Project (Keizer Transit Center)	2,800,000
PA	D2011-BLIV-039	Lehigh and Northampton Transportation Authority	Leasing of New Intermodal Transportation Facility	4,000,000
PA	D2011-BLIV-040	Southeastern Pennsylvania Transportation Authority (SEPTA)	33rd and Dauphin Bus Facility Rehabilitation Project	5,000,000
SD	D2011-BLIV-041	South Dakota Department of Transportation	Routing Software Upgrade ($480,000); Paratransit Vehicle Purchase for Sioux Transit ($116,000)	596,000
TN	D2011-BLIV-042	Chattanooga Area Regional Transportation Authority	Bus and Recreation Center Connections	440,000
TN	D2011-BLIV-043	Memphis Area Transit Authority	Traffic Signal Priority System	644,000
TX	D2011-BLIV-044	Brazos Transit District	The Woodlands Transit Terminal	1,840,791
TX	D2011-BLIV-045	Capital Metropolitan Transportation Authority	MetroBike Facilities at Six Major Transit Stations (Last-Mile Solution)	554,473
TX	D2011-BLIV-046	City of Galveston	Transit Pedestrian Access and Beautification Plan	2,000,000
TX	D2011-BLIV-047	Texas Department of Transportation	Conroe Transit Access Improvements to Support Multi-Modal Options	2,101,800
TX	D2011-BLIV-048	VIA Metropolitan Transit	Vehicle Purchase and Equipment for Bus Rapid Transit	3,000,000
UT	D2011-BLIV-049	Park City Municipal Corporation	Expanded Bus Maintenance Facility	1,500,000
VT	D2011-BLIV-050	Chittenden County Transportation Authority	Vehicle, Signal Priority Equipment, and Passenger Shelter Purchase	3,360,000
VA	D2011-BLIV-051	Hampton Roads Transit	Purchase and Installation of Bus Shelters	640,000
WA	D2011-BLIV-052	Central Puget Sound Regional Transit Authority	Bus, Bicycle, and Pedestrian Access Improvements to Intermodal Station (South 200th Street Intermodal Station)	3,000,000
WA	D2011-BLIV-053	Snohomish County Transportation Benefit Area	Swamp Creek Park & Ride Rehabilitation	894,578
WA	D2011-BLIV-054	Washington State Department of Transportation	Clallam Transit ITS Enhanced Mobility ($536,000); Mason Transit Regional Transportation Center ($3,280,000)	3,816,000
WV	D2011-BLIV-055	Monongalia County Urban Mass Transit Authority	Bus Replacement	560,000
			Total……	**$150,233,503**

Table 2

ALTERNATIVES ANALYSIS PROJECT SELECTIONS

State	Project ID	Recipient	Project Description	Allocation
AR	D2011-ALTA-001	Northwest Arkansas Regional Planning Commission	Northwest Arkansas North-South Corridor Transportation Alternatives Analysis	$200,000
AZ	D2011-ALTA-002	City of Phoenix	South Central Corridor Alternatives Analysis	$1,000,000
CA	D2011-ALTA-003	Omnitrans	sbX Holt Boulevard/4th Street Corridor Alternatives Analysis	$850,000
CA	D2011-ALTA-004	Transbay Joint Powers Authority	Transbay Transit Center Program Revisions	$1,240,000
CT	D2011-ALTA-005	City of New Haven	New Haven Streetcar Alternatives Analysis	$760,000
CT	D2011-ALTA-006	Greater Bridgeport Transit Authority	Alternative Modes Assessment to Connect Transit Oriented Districts in the Greater Bridgeport Planning Region	$180,000
FL	D2011-ALTA-007	Broward Metropolitan Planning Organization	University Drive Alternatives Analysis	$1,500,000
FL	D2011-ALTA-008	Central Florida Regional Transportation Authority - LYNX	State Road 50 / UCF Connector Alternatives Analysis	$1,200,000
GA	D2011-ALTA-009; D2011-ALTA-08002	Metropolitan Atlanta Rapid Transit Authority	North Line (SR 400 Corridor) Alternatives Analysis	$480,000
ID	D2011-ALTA-010	City of Boise	First Phases of Downtown Boise Circulator System	$375,000
IL	D2011-ALTA-011	Chicago Transit Authority	Chicago Lakefront Corridor Alternatives Analysis	$2,000,000
IL	D2011-ALTA-012	Tri-County Regional Planning Commission	Peoria - Bloomington / Normal Alternatives Analysis	$160,000
IN	D2011-ALTA-013	City of Indianapolis	Central Corridors Alternatives Analysis	$2,000,000
MI	D2011-ALTA-014	Ann Arbor Transportation Authority	Ann Arbor Connector	$1,200,000
MI	D2011-ALTA-015	Interurban Transit Partnership	Laker Line BRT Project	$600,000
MI	D2011-ALTA-016	Southeast Michigan Council of Governments	Central Woodward Corridor Alternatives Analysis	$2,000,000
MN	D2011-ALTA-017	Metropolitan Council / Metro Transit	Midtown Corridor Alternatives Analysis	$600,000
MO	D2011-ALTA-018	Bi-State Development Agency	Interstate 55 Corridor Study	$200,000

State	Project ID	Recipient	Project Description	Allocation
NC	D2011-ALTA-019	Town of Chapel Hill	Martin Luther King, Jr. Boulevard Alternatives Analysis	$560,000
NM	D2011-ALTA-020	Mid-Region Council of Governments	University of New Mexico / Central New Mexico Community College Area Alternatives Analysis	$400,000
NY	D2011-ALTA-021	Capital District Transportation Authority	Washington Western Bus Rapid Transit Study	$400,000
NY	D2011-ALTA-022	Niagara Frontier Transportation Authority	Amherst-Buffalo Corridor Alternatives Analysis	$1,200,000
NY	D2011-ALTA-023	Town of Babylon	Route 110 Alternatives Analysis	$360,000
OH	D2011-ALTA-024	Greater Cleveland Regional Transit Authority	Red Line / HealthLine Extension Alternatives Analysis	$1,000,000
OH	D2011-ALTA-025	METRO Regional Transit Authority	Akron North-South Corridor Alternatives Analysis	$270,000
OK	D2011-ALTA-026	Indian Nations Council of Governments	Peoria Avenue / Riverside Drive Alternatives Analysis	$340,000
OR	D2011-ALTA-027	Lane Transit District	EmX Corridor Development - Main Street / McVay Highway	$750,000
PA	D2011-ALTA-028	Port Authority of Allegheny County	Downtown Oakland - East End BRT Alternatives Analysis	$240,000
SC	D2011-ALTA-029	Berkeley-Charleston-Dorchester Council of Governments	Charleston Area Fixed Guideway Transit Solution	$360,000
TN	D2011-ALTA-030	Memphis Area Transit Authority	Madison Avenue Midtown Connector	$800,000
TX	D2011-ALTA-031	City of Galveston	Galveston to Houston Alternatives Analysis Completion	$240,000
TX	D2011-ALTA-032; D2011-ALTA-10001	Metropolitan Transit Authority of Harris County	East Downtown Urban Circulator Study	$250,000
VA	D2011-ALTA-033	City of Alexandria	Van Dorn / Beauregard (Corridor C) High Capacity Transit Alternatives Analysis	$800,000
WA	D2011-ALTA-034	City of Seattle	Seattle Center City Connector Transit Alternatives Analysis	$900,000
			Total……	**$25,415,000**

[FR Doc. 2011–28779 Filed 11–4–11; 8:45 am]
BILLING CODE 4910–57–C

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

State of Good Repair Bus and Bus Facilities Discretionary Program Funds

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: State of Good Repair Bus and Bus Facilities Program Announcement of Project Selections.

SUMMARY: The U.S. Department of Transportation's (DOT) Federal Transit Administration (FTA) announces the selection of projects funded with Section 5309 Bus and Bus Facilities program funds in support of the State of Good Repair (SGR) Initiative, which was announced in the State of Good Repair

Initiative Notice of Funding Availability on June 24, 2011. The SGR Initiative makes funds available to public transit providers to finance capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities, including programs of bus and bus-related projects for assistance to subrecipients that are public agencies, private companies engaged in public transportation, or private non-profit organizations. Additionally, the SGR Initiative makes funds available for Transit Asset Management systems.

FOR FURTHER INFORMATION CONTACT: Successful and unsuccessful applicants should contact the appropriate FTA Regional office (Appendix) for specific information regarding applying for the funds or proposal specific questions. For general program information on the Bus and Bus Facilities program contact Samuel Snead, Office of Program Management, at (202) 366–1089, email: *Samuel.Snead@dot.gov,* or Kimberly Sledge, Office of Program Management, at (202) 366–2053, email: *Kimberly.Sledge@dot.gov.*

SUPPLEMENTARY INFORMATION: A total of $750 million was available for FTA's SGR Initiative. A total of 519 proposals requested $3.56 billion, indicating significant demand for funds. Project proposals were evaluated based on the criteria detailed in the June 24, 2011 Notice of Funding Availability. In selecting projects for funding using Bus Program funds, FTA ensured that at least 5.5 percent of the FY 2011 Section 5309 funds, or $53.5 million, is being allocated to projects that are not in urbanized areas. Additionally, at least $35 million is being allocated for intermodal terminal projects. The projects selected and shown in Table 1 will provide funds to help maintain the nation's public transportation bus fleet, infrastructure, and equipment in a state of good repair.

Project Implementation: Grantees selected for competitive discretionary funding should work with their FTA regional office to finalize the grant application FTA's Transportation Electronic Award Management system (TEAM) for the projects identified in the attached table and so that funds can be obligated expeditiously. FTA funds may only be used for eligible purposes defined under 49 U.S.C. 5309(b)(3) and described in FTA C. 9030.1C. In cases where the allocation amount is less than the proposer's requested amount, grantees should work with the regional office to reduce scope or scale the project such that a complete phase or project is accomplished. A discretionary project identification number has been assigned to each project for tracking purposes and must be used in the TEAM application. Selected projects have pre-award authority as of October 17, 2011.

Post-award reporting requirements include submission of the Federal Financial Report (FFR) and Milestone Report in TEAM as appropriate (see FTA.C.5010.1D).

The grantee must comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out the project supported by the FTA grant. FTA emphasizes that grantees must follow all third-party procurement guidance, as described in FTA.C.4220.1F. Funds allocated in this announcement must be obligated in a grant by September 30, 2014.

Issued in Washington, DC, this 2nd day of November 2011.

Peter Rogoff,

Administrator.

Appendix

FTA Regional and Metropolitan Offices

Mary E. Mello, Regional Administrator, Region 1—Boston, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142–1093, Tel. 617–494–2055.

States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

Anthony Carr, Acting Regional Administrator, Region 2—New York, One Bowling Green, Room 429, New York, NY 10004–1415, Tel. 212–668–2170.

States served: New Jersey, New York.

New York Metropolitan Office, Region 2—New York, One Bowling Green, Room 428, New York, NY 10004–1415, Tel. 212–668–2202.

Brigid Hynes Cherin, Acting Regional Administrator, Region 3—Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215–656–7100.

States served: Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and District of Columbia.

Washington, D.C. Metropolitan Office, 1990 K Street NW., Room 510, Washington, DC 20006, Tel. 202–219–3562.

Yvette Taylor, Regional Administrator, Region 4—Atlanta, 230 Peachtreet Street NW., Suite 800, Atlanta, GA 30303, Tel. 404–865–5600.

States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and Virgin Islands.

Marisol Simon Regional Administrator Region 5—Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789.

States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

Chicago Metropolitan Office Region 5—Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789.

Robert C. Patrick, Regional Administrator, Region 6—Ft. Worth, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, Tel. 817–978–0550.

States served: Arkansas, Louisiana, Oklahoma, New Mexico and Texas.

Mokhtee Ahmad, Regional Administrator, Region 7—Kansas City, MO, 901 Locust Street, Room 404, Kansas City, MO 64106, Tel. 816–329–3920.

States served: Iowa, Kansas, Missouri, and Nebraska.

Terry Rosapep Regional Administrator, Region 8—Denver, 12300 West Dakota Ave., Suite 310, Lakewood, CO 80228–2583, Tel. 720–963–3300.

States served: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.

Leslie T. Rogers Regional Administrator Region 9—San Francisco, 201 Mission Street, Room 1650, San Francisco, CA 94105–1926, Tel. 415–744–3133.

States served: American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands.

Los Angeles Metropolitan Office, Region 9—Los Angeles, 888 S. Figueroa Street, Suite 1850, Los Angeles, CA 90017–1850, Tel. 213–202–3952.

Rick Krochalis, Regional Administrator, Region 10—Seattle, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174–1002, Tel. 206–220–7954.

States served: Alaska, Idaho, Oregon, and Washington.

BILLING CODE 4910–57–P

Table 1
STATE OF GOOD REPAIR PROJECT SELECTIONS

ST	Project ID	Applicant Legal Name	Project Description	Allocation
AK	D2011-BUSP-001	Municipality of Anchorage	People Mover Maintenance Facility Roof Replacement	$2,400,000
AL	D2011-BUSP-002	City of Huntsville, Alabama	The City of Huntsville Public Transit Bus Maintenance Facility	$3,293,061
AR	D2011-BUSP-003	Central Arkansas Transit Authority	Maintenance Building Conversion to Compressed Natural Gas	$1,009,088
AZ	D2011-BUSP-004	City of Phoenix Public Transit Department	Regional Operating and Maintenance Facilities Refurbishments	$6,320,000
AZ	D2011-BUSP-005	City of Tucson	Upgrade CNG fueling station ($1,920,000); Vehicle Replacements ($3,697,650)	$5,617,650
AZ	D2011-BUSP-006	Navajo Transit System	Electric Bus Replacement Program	$5,000,000
CA	D2011-BUSP-007	Alameda-Contra Costa Transit District	Upgrades to existing database, Environmental/structural upgrades to general office building, and replacement of elevator systems	$6,677,074
CA	D2011-BUSP-008	Central Contra Costa Transit Authority	Maintenance Facility Rehab ($480,000) ; Transit Asset Management ($300,000)	$780,000
CA	D2011-BUSP-009	City of Fresno, Fresno Area Express	Fresno Area Express Vehicle Replacements	$2,199,600
CA	D2011-BUSP-010	City of Petaluma	Petaluma Maintenance Facility Rehabilitation - Phase II	$800,000
CA	D2011-BUSP-011	City of Fairfield	Vehicle Replacements	$1,500,000
CA	D2011-BUSP-012	Gold Coast Transit	Gold Coast Transit New Operations & Maintenance Facility	$15,000,000
CA	D2011-BUSP-013	Long Beach Public Transportation Company	Bus Lift Replacements	$1,738,800
CA	D2011-BUSP-014	Los Angeles County Metropolitan Transportation Authority	Vehicle Replacements	$25,000,000
CA	D2011-BUSP-015	Napa County Transportation and Planning Agency	Vehicle Replacements	$2,376,000
CA	D2011-BUSP-016	North County Transit District	Vehicle Replacements	$4,621,860
CA	D2011-BUSP-017	Omnitrans	Vehicle Replacements	$5,000,000
CA	D2011-BUSP-018	Orange County Transportation Authority	OCTA Methane Detection System Replacement & Modernization ($160,000); OCTA Underground Storage Removal & Replacement ($828,000)	$988,000
CA	D2011-BUSP-019	Riverside Transit Agency	DAR Vehicle Replacements ($735,000); RTA Hemet Facility Rehabilitation ($665,000); RTA Riverside Facility Rehabilitation ($665,000)	$2,065,000

STATE OF GOOD REPAIR PROJECT SELECTIONS

ST	Project ID	Applicant Legal Name	Project Description	Allocation
CA	D2011-BUSP-020	Sacramento Regional Transit District	City of Folsom Vehicle Replacements ($300,000); Paratransit Inc. Vehicle Replacements ($1,763,750); SRTD Vehicle Replacements ($5,000,000); Yuba-Sutter Transit Authority (YSTA) Vehicle Replacements ($1,080,000)	$8,143,750
CA	D2011-BUSP-021	San Francisco Bay Area Rapid Transit District (BART)	Enterprise Asset Management ($2,000,000); MacArthur BART Station Bus Intermodal ($970,000)	$2,970,000
CA	D2011-BUSP-022	San Joaquin Regional Transit District	Construction of Fuel and Wash Building	$8,517,000
CA	D2011-BUSP-023	San Luis Obispo Regional Transit Authority	Fixed Route Vehicle Replacements ($1,900,000); Runabout ADA Vehicle Replacements ($84,600)	$1,984,600
CA	D2011-BUSP-024	San Mateo County Transit District	Bus Lift Overhaul ($746,000); Radio Communications/Narrowbanding ($295,000)	$1,041,000
CA	D2011-BUSP-025	Santa Clara Valley Transportation Authority (VTA)	VTA Vehicle Replacements	$3,640,000
CA	D2011-BUSP-026	Santa Cruz Metropolitan Transit District	CNG Fleet Conversion and Paratransit Mobile Data Terminals	$2,814,538
CA	D2011-BUSP-027	Susanville Indian Rancheria	Maintenance Equipment, Communication Devices, and Bike Racks ($25,600); Transit Bus Replacement ($88,000)	$113,600
CO	D2011-BUSP-028	City of Fort Collins	Vehicle Replacements	$332,000
CO	D2011-BUSP-029	Colorado Department of Transportation	City of Black Hawk Vehicle Replacement ($164,000); City of Durango - Construct Access Improvements to Brookside Transit Stop and ADA Improvements to the 24th Street Bridge ($132,355); City of Steamboat Springs Transit Vehicle Replacements and Rehabilitation ($1,765,910); Eagle County RTA Vehicle Replacements ($1,132,037); Transit Asset Management Roaring Fork ($200,000)	$3,394,302
CO	D2011-BUSP-030	Regional Transportation District	Civic Center Rehabilitation Project ($6,864,741); Transit Asset Management ($160,000)	$7,024,741
DC	D2011-BUSP-031	Washington Metropolitan Area Transit Authority	Integrated Asset Management	$1,500,000
DE	D2011-BUSP-032	Delaware DOT/Delaware Transit Corporation	Wilmington Administration Center, Bus Shelters, Panels, Bus Stops Fuels Tanks, Mid County Facility and Paving	$4,550,000
FL	D2011-BUSP-033	Indian River County	Vehicle Replacement	$500,000
FL	D2011-BUSP-034	Jacksonville Transportation Authority	Vehicles and Facility Rehabilitation/ Replacements	$308,200

STATE OF GOOD REPAIR PROJECT SELECTIONS				
ST	Project ID	Applicant Legal Name	Project Description	Allocation
FL	D2011-BUSP-035	Lee County Florida Government	LeeTran Vehicle Replacements	$13,920,000
FL	D2011-BUSP-036	St Johns County Florida	Sunshine Bus Company Vehicle Replacements	$527,780
FL	D2011-BUSP-037	Florida Department of Transportation	Florida Department of Transportation State of Good Repair Grant Application for FFY11 Council on Aging of Clay County (COACC)	$468,736
FL	D2011-BUSP-038	Pinellas Suncoast Transit Authority	Vehicle Replacements	$5,000,000
GA	D2011-BUSP-039	Metropolitan Atlanta Rapid Transit Authority	Brady Mobility Paratransit Facility Improvements - Phase II ($14,080,000); Browns Mill Heavy Maintenance Facility Improvements ($5,628,000); Vehicle Replacements ($7,000,000)	$26,708,000
HI	D2011-BUSP-040	City & County Honolulu Department of Transportation Services	Vehicle Replacements	$12,000,000
HI	D2011-BUSP-041	Hawaii Department of Transportation	Kaua'i Vehicle Replacements ($975,000); Maui Vehicle Replacements ($1,780,000); County of Hawaii Hele-On Vehicle replacements ($1,200,000)	$3,955,000
IA	D2011-BUSP-042	City of Dubuque	The Dubuque Intermodal Transportation System (DITS)	$8,000,000
IA	D2011-BUSP-043	Des Moines Area Regional Transit Authority	Vehicle Replacements	$2,101,560
IA	D2011-BUSP-044	Iowa Department of Transportation	Vehicle Replacements	$5,000,000
ID	D2011-BUSP-045	Idaho Department of Transportation	Mountain Rides Transportation Authority - Vehicles ($304,000); Statewide - Interactive Voice Response (IVR) System for Demand Response Mobility Services ($360,000); Transit Asset Management ($70,000); Treasure Valley Transit - McCall Transit Center ($1,052,634)	$1,786,634
IL	D2011-BUSP-046	Bloomington-Normal Public Transit System	ITS software, hardware, and equipment procurement for fixed route service ($376,000); Radios, hardware and equipment ($89,600)	$465,600
IL	D2011-BUSP-047	Chicago Transit Authority	Vehicle Replacements and Associated Equipment/Hoists	$30,000,000
IL	D2011-BUSP-048	Illinois Department of Transportation	Vehicle Replacements	$3,500,000
IL	D2011-BUSP-049	Pace, Suburban Bus Division of the RTA	Purchase replacement emergency generators for up to seven garage facilities including engineering	$5,075,000

STATE OF GOOD REPAIR PROJECT SELECTIONS

ST	Project ID	Applicant Legal Name	Project Description	Allocation
IL	D2011-BUSP-050	Rock Island County Metropolitan Mass Transit District	MetroLINK Vehicle Replacement	$3,000,000
IN	D2011-BUSP-051	Bloomington Public Transportation Corporation	Vehicle Replacements	$1,037,500
IN	D2011-BUSP-052	South Bend Public Transportation Corporation (TRANSPO)	Vehicle Replacements	$3,320,000
KY	D2011-BUSP-053	Transit Authority of River City (TARC)	TARC Vehicle Replacements	$5,104,515
LA	D2011-BUSP-054	Jefferson Parish	Vehicle Replacements	$1,310,781
LA	D2011-BUSP-055	Lafayette Consolidated Government	Maintenance Facility Rehabilitation	$479,762
MA	D2011-BUSP-056	Berkshire Regional Transit Authority	Facility Upgrade ($247,200); Interoperability Initiative Farebox Replacement ($644,000); Vehicle Replacements ($1,400,000)	$2,291,200
MA	D2011-BUSP-057	Brockton Area Transit Authority	Intermodal Centre Paving and Maintenance Facility Upgrades	$675,000
MA	D2011-BUSP-058	Massachusetts Department of Transportation	Vehicle Replacements	$18,433,045
MA	D2011-BUSP-059	Montachusett Regional Transit Authority	Vehicle Replacements	$1,500,000
MD	D2011-BUSP-060	Maryland Department of Transportation	Vehicle Replacements	$8,000,000
ME	D2011-BUSP-061	Maine Department of Transportation	Portland Main Metro Bus Service Facilities and Support Equipment ($1,148,000); South Portland, Maine Vehicle Replacements ($640,000)	$1,788,000
MI	D2011-BUSP-062	Blue Water Area Transportation Commission	Transfer Center Replacement	$6,860,000
MI	D2011-BUSP-063	Capital Area Transportation Authority	Vehicle Replacements and Rehabilitation	$4,000,000
MI	D2011-BUSP-064	City of Detroit Department of Transportation	Coolidge Terminal & Garage Overhaul ($518,291); Transit Asset Management ($320,000); Vehicle Replacement ($6,000,000)	$6,838,291
MI	D2011-BUSP-065	Macatawa Area Express Transportation Authority	Bus Maintenance Facility Replacement	$2,000,000
MI	D2011-BUSP-066	Mass Transportation Authority	Vehicle Replacements	$5,187,500
MI	D2011-BUSP-067	Michigan Department of Transportation	Bus Facility for Thunder Bay Transportation Authority ($6,000,000); Statewide Equipment Projects ($746,770)	$6,746,770
MN	D2011-BUSP-068	City of Rochester, Minnesota	Phase V. Transit Operations Center/ Bus Storage Garage with Wash, Lube, Fuel and other support systems	$7,045,303
MN	D2011-BUSP-069	Minnesota Department of Transportation	Phase II - Albert Lea Transit Garage and Operations Facility	$340,000

STATE OF GOOD REPAIR PROJECT SELECTIONS				
ST	**Project ID**	**Applicant Legal Name**	**Project Description**	**Allocation**
MO	D2011-BUSP-070	Bi-State Development Agency	Bus Related Equipment ($970,792); Transit Asset Management ($677,840)	$1,648,632
MO	D2011-BUSP-071	City of Columbia, Missouri	Vehicle Replacements and Related Equipment	$2,047,644
MO	D2011-BUSP-072	City Utilities of Springfield, Missouri	Vehicle Replacements	$3,000,000
MO	D2011-BUSP-073	Missouri Department of Transportation	OATS, Inc. Southwest Region Administrative - Maintenance Transit Facility	$2,612,429
MT	D2011-BUSP-074	Montana Department of Transportation	Replacement for the 1999 Model Year Vehicle (Butte Silver Bowe) ($280,000); HRDC/Galavan/Streamline Transit Vehicle Replacement and Equipment ($382,050)	$662,050
NC	D2011-BUSP-075	Town of Chapel Hill	Chapel Hill Transit Vehicle Replacements	$7,470,000
ND	D2011-BUSP-076	North Dakota Department of Transportation	Vehicle Replacements	$1,000,000
NJ	D2011-BUSP-077	New Jersey Transit Corporation	Bus Radio/On-Board "Smart Bus" Technology Retrofit	$8,572,200
NM	D2011-BUSP-078	New Mexico Department of Transportation	Transit Asset Management for Rural Areas of New Mexico ($200,000) ; Vehicle Replacements for Rural Areas of New Mexico ($1,750,000)	$1,950,000
NV	D2011-BUSP-079	Regional Transportation Commission of Southern Nevada	IBMF Facility Upgrades ($1,750,000); Fuel Island Construction ($335,376); Vehicle Replacements ($4,772,500)	$6,857,876
NY	D2011-BUSP-080	Capital District Transportation Authority	Vehicle Replacements	$4,000,000
NY	D2011-BUSP-081	Central New York Regional Transportation Authority	Vehicle Replacements	$13,418,960
NY	D2011-BUSP-082	County of Chemung, New York	Chemung County Transit System Vehicle Replacements ($1,290,000) ; Purchase and Installation of Power Generator for Maintenance Facility ($80,000)	$1,370,000
NY	D2011-BUSP-083	Dutchess County	Vehicle Replacements	$2,556,000
NY	D2011-BUSP-084	New York Metropolitan Transportation Authority	Replacement of Bus Radio System and Command Center (Infrastructure) ($34,272,672); Upgrade and Replacement of Facility Equipment at Four MTA NYCT Depots ($14,320,000); Vehicle Replacements ($14,780,208); Vehicle Replacements ($49,254,336)	$112,627,216
NY	D2011-BUSP-085	Rochester Genesee Regional Transportation Authority	Vehicle Replacements	$7,299,114
OH	D2011-BUSP-086	Central Ohio Transit Authority	Transportation Asset Management System Upgrade - Ellipse	$1,000,000
OH	D2011-BUSP-087	Greater Cleveland Regional Transit Authority	Bus Pavement Parking Improvement Program	$3,168,000

STATE OF GOOD REPAIR PROJECT SELECTIONS				
ST	**Project ID**	**Applicant Legal Name**	**Project Description**	**Allocation**
OH	D2011-BUSP-088	METRO Regional Transit Authority	Vehicle Replacements ($2,000,000); Vehicle Replacements ($1,472,000)	$3,472,000
OH	D2011-BUSP-089	Stark Area Regional Transit Authority	Gateway Facility Upgrades	$368,000
OK	D2011-BUSP-090	Metropolitan Tulsa Transit Authority	Vehicle Replacements & Bus Washer	$1,240,500
OK	D2011-BUSP-091	Oklahoma Department of Transportation	KIBOIS Area Transit System Vehicle Replacements ($1,175,280); Little Dixie Transit Vehicle Replacements ($522,900); RED - Community Action Development Corporation (Red River Transportation Service) - Vehicle Replacements ($283,860)	$1,982,040
OR	D2011-BUSP-092	Lane Transit District	Vehicle Replacements	$3,000,000
OR	D2011-BUSP-093	Rogue Valley Transportation District	Vehicle Replacements	$1,093,023
OR	D2011-BUSP-094	Tri-County Metropolitan Transportation District of Oregon	Vehicle Replacements	$5,000,000
PA	D2011-BUSP-095	Cambria County Transit Authority	Facility Construction	$6,000,000
PA	D2011-BUSP-096	Centre Area Transportation Authority	Vehicle Replacements	$6,336,000
PA	D2011-BUSP-097	Erie Metropolitan Transit Authority	Joint Operations Facility	$13,934,520
PA	D2011-BUSP-098	Lehigh and Northampton Transportation Authority	Allentown Maintenance Garage	$10,400,000
PA	D2011-BUSP-099	Southeastern Pennsylvania Transportation Authority (SEPTA)	Vehicle Replacements	$15,000,000
PA	D2011-BUSP-100	Transportation & Motor Buses for Public Use Authority	AMTRAN Maintenance Facility Rehabilitation ($134,400) ; Vehicle Replacements ($200,000)	$334,400
PA	D2011-BUSP-101	York County Transportation Authority (YCTA)	Renovation/Modernization Bus Maintenance Facility	$6,000,000
PR	D2011-BUSP-102	Puerto Rico Highway and Transportation Authority	Puerto Rico Intermodal Development Enhancement (PRIDE)-Replacement, Upgrade and Expansion of Intermodal and Integrated Automated Fare Collection Systems	$6,720,000
RI	D2011-BUSP-103	Rhode Island Public Transit Authority	Transit Asset Management	$1,500,000
SC	D2011-BUSP-104	Pee Dee Regional Transportation Authority	Maintenance Facility	$2,091,507
SC	D2011-BUSP-105	Waccamaw Regional Transportation Authority	Transit Asset Management	$4,798

STATE OF GOOD REPAIR PROJECT SELECTIONS				
ST	Project ID	Applicant Legal Name	Project Description	Allocation
SD	D2011-BUSP-106	South Dakota Department of Transportation	River Cities Public Transit Concrete surfacing ($520,000); Sisseton South Dakota Bus Garage Upgrades ($240,000); Vehicle Replacements ($1,680,000)	$2,440,000
TN	D2011-BUSP-107	Chattanooga Area Regional Transportation Authority	Vehicle Replacements	$4,148,000
TN	D2011-BUSP-108	Nashville Metropolitan Transit Authority	Myatt Maintenance Facility Renovation ($4,649,819); Nestor Facility Roof Replacement ($721,131)	$5,370,950
TX	D2011-BUSP-109	Capital Metropolitan Transportation Authority	Vehicle Replacements	$3,000,000
TX	D2011-BUSP-110	City of El Paso	El Paso Millennium Vehicle Replacements	$5,000,000
TX	D2011-BUSP-111	City of Longview	Longview Transit Facility Rehab	$449,600
TX	D2011-BUSP-112	DALLAS AREA RAPID TRANSIT	Vehicle Replacements	$12,000,000
TX	D2011-BUSP-113	Denton County Transportation Authority	Facility Replacement	$8,200,000
TX	D2011-BUSP-114	Metropolitan Transit Authority of Harris County, Texas	Facility Improvements for Kashmere and Hiram Clarke Transit ($8,000,000); Asset Management ($3,212,000)	$11,212,000
TX	D2011-BUSP-115	Texoma Area Paratransit System Inc.	Vehicle Replacements	$4,230,000
TX	D2011-BUSP-116	VIA Metropolitan Transit	Facility Improvements	$3,000,000
UT	D2011-BUSP-117	Utah Transit Authority	Vehicle Replacements	$1,740,000
VA	D2011-BUSP-118	GRTC Transit System	Vehicle Replacements	$3,376,630
VA	D2011-BUSP-119	Potomac and Rappahannock Transportation Commission	Bus Overhaul Program	$2,600,000
VI	D2011-BUSP-120	Government of the Virgin Islands	Upgrade and improve maintenance facility (St. Thomas)	$1,080,000
VT	D2011-BUSP-121	Vermont Agency of Transportation	Software, Training and Computer Hardware	$4,125,840
WA	D2011-BUSP-122	Central Puget Sound Regional Transit Authority	Vehicle Replacements	$5,415,000
WA	D2011-BUSP-123	Chelan/Douglas Public Transportation Benefit Area	Link Transit - HVAC system replacement at Columbia Station ($90,000); Link Transit Roof Replacement - Columbia Station ($50,000)	$140,000
WA	D2011-BUSP-124	Clark County Public Transportation Benefit Area (CCPTBA)	C-TRAN Maintenance Efficiency Project Phase II	$1,142,200
WA	D2011-BUSP-125	King County Department of Transportation	King County Metro - North Base Roof Replacement ($5,021,313); Transit Asset Management ($965,951)	$5,987,264
WA	D2011-BUSP-126	Lummi Nation	Vehicle Replacements	$208,000
WA	D2011-BUSP-127	Spokane Transit Authority	Replace bus washer, emergency generators and maintenance lifts ($1,066,000); Vehicle Replacements ($937,056)	$2,003,056
WA	D2011-BUSP-128	Spokane Tribe of Indians	Spokane Tribe Transit Garage and Storage Project	$438,237

STATE OF GOOD REPAIR PROJECT SELECTIONS

ST	Project ID	Applicant Legal Name	Project Description	Allocation
WA	D2011-BUSP-129	Stillaguamish Tribe of Indians	Vehicle Replacements	$156,024
WA	D2011-BUSP-130	Washington State Department of Transportation	Garfield County Transportation Vehicle Replacements ($30,400); Grant Transit Authority Vehicle Replacements ($144,000); Grays Harbor Transportation Authority Vehicle Replacements($224,000); Island Transit Facilities Replacement ($17,920,000); Maintenance Facility Replacement ($260,000); Mason County Transportation Vehicle Replacements ($871,200); Pacific Transit Dial-a-Ride Vehicle Replacements ($96,000); Pullman Transit Vehicle Replacements ($1,512,000); Clallam Vehicle Replacements ($1,264,000)	$22,321,600
WA	D2011-BUSP-131	Whatcom Transportation Authority	Vehicle Replacements	$2,821,760
WI	D2011-BUSP-132	City of Eau Claire	Vehicle Replacements	$880,000
WI	D2011-BUSP-133	Milwaukee County	Vehicle Replacements	$7,000,000
WI	D2011-BUSP-134	Wisconsin Department of Transportation	City of Appleton Valley Replacement of Bus Shelters, ADA Facility Improvements, Bus Equipment , and Support Vehicles (220,800); City of Fond du Lac Vehicle Replacements ($578,730); City of La Crosse Vehicle Replacements ($1,320,000); City of Madison Replacement of Vehicles That Met Useful Life, Farebox System Upgrade, Replacement Passenger Shelters ($5,160,800); City of Racine Vehicle Replacements ($4,760,000); City of Waukesha Engine and Transmission Rebuilds ($123,200)	$12,163,530
WV	D2011-BUSP-135	Mid-Ohio Valley Transit Authority	Maintenance Facility	$3,000,000
WV	D2011-BUSP-136	Tri-State Transit Authority	Vehicle Replacements and Roof Repairs	$2,609,400
WY	D2011-BUSP-137	Wyoming Department of Transportation	Phase II - START Bus Regional Transportation Storage, Maintenance and Operations Building	$5,000,000
			Total.....	**$752,681,841**

[FR Doc. 2011–28774 Filed 11–4–11; 8:45 am]
BILLING CODE 4910–57–C

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket ID PHMSA–2011–0295]

Pipeline Safety: Emergency Responder Forum

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of Forum.

SUMMARY: PHMSA is co-sponsoring a one-day Emergency Responder Forum with the National Association of Pipeline Safety Representatives and the United States Fire Administration. The purpose of the forum is to convene a meeting of emergency response and management community leaders, pipeline safety regulators, pipeline industry representatives, and interested members of the public to solicit expert counsel that will inform the development of a strategy for improving emergency responders' ability to prepare for and respond to natural gas and hazardous liquid pipeline emergencies.

DATES: The forum will be held on December 9, 2011. Name badge pick up and on-site registration will be available starting at 7 a.m., with the forum taking place from 8 a.m. until approximately 5:30 p.m. eastern time. A webcast of the proceedings will be available. Pre-registration for the forum is available until December 2, 2011, at the meeting Web site at *https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=74*. Also refer to the

meeting Web site for information about the preliminary agenda and the webcast.

ADDRESSES: The workshop will be held at U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590 in the atrium of the west building (New Jersey Avenue entrance, across the street from the Navy Yard Metro station). Attendees should arrive early to allow for time to go through security.

A block of hotel rooms has been reserved at Courtyard by Marriott Capitol Hill/Navy Yard, (866) 329–0003. Hotel reservations must be made on or before November 17, 2011, to receive a rate of $183 for the nights of December 8 and 9, 2011. Mention ''Emergency Responder Forum Room Block'' for the U.S. Department of Transportation when you make your reservation to receive this rate. Please call the hotel for more information on the Americans with Disabilities Act amenities at this location.

FOR FURTHER INFORMATION CONTACT: Sam Hall at (804) 556–4678 or by email at *sam.hall@dot.gov*.

SUPPLEMENTARY INFORMATION:

Registration: Members of the public may attend this free forum. To help ensure that adequate arrangements are made, all attendees and webcast viewers are encouraged to pre-register for the forum at *https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=74.* Hotel reservations must be made by contacting the hotel directly.

Comments: Members of the public may also submit written comments, either before or after the workshop. Comments should reference Docket ID PHMSA–2011–0295. Comments may be submitted in the following ways:

- *E-Gov Web Site: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency. Follow the instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Management System, Room W12–140, on the ground floor of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Instructions:* Identify the Docket ID PHMSA–2011–0295 at the beginning of your comments. If you submit your comments by mail, submit two copies. If you wish to receive confirmation that PHMSA has received your comments, include a self-addressed stamped postcard. Internet users may submit comments at *http://www.regulations.gov*.

Note: Comments will be posted without changes or edits to *http://www.regulations.gov* including any personal information provided. Please see the Privacy Act heading below for additional information.

- *Privacy Act Statement:* Anyone may search the electronic form of all comments received for any of our dockets. The Privacy Notice for comment submissions may be reviewed at *http://www.regulations.gov*. You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000 (65 FR 19477) or you may visit *http://DocketsInfo.dot.gov*.

Information on Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, please contact Sam Hall at (804) 556–4678 or *sam.hall@dot.gov* by December 2, 2011.

Issued in Washington, DC, on November 2, 2011.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

[FR Doc. 2011–28791 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2011–0246; Notice No. 11–11]

International Standards on the Transport of Dangerous Goods; Public Meeting

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation.

ACTION: Notice of public meeting.

SUMMARY: This notice is to advise interested persons that PHMSA will conduct a public meeting in preparation for the 40th session of the United Nations Sub-Committee of Experts on the Transport of Dangerous Goods (UNSCOE TDG) to be held November 28 to December 7, 2011, in Geneva, Switzerland. During this meeting, PHMSA is also soliciting comments relative to potential new work items which may be considered for inclusion in its international agenda.

Information Regarding the UNSCOE TDG Meeting:

DATES: Thursday, November 17, 2011; 1 p.m.–4 p.m.

ADDRESSES: The meeting will be held at the DOT Headquarters, West Building, Conference Rooms 8–10, 1200 New Jersey Avenue SE., Washington, DC 20590.

Registration: Pre-registration for this meeting is not required. Participants are encouraged to arrive early to allow time for security checks necessary to obtain access to the building.

Conference Call Capability/Live Meeting Information: Conference call-in and ''live meeting'' capability will be provided for this meeting. Specific information on call-in and live meeting access will be posted when available at *http://www.phmsa.dot.gov/hazmat/regs/international.*

FOR FURTHER INFORMATION CONTACT: Mr. Shane Kelley, Senior International Transportation Specialist, Office of Hazardous Materials Safety, Department of Transportation, Washington, DC 20590; (202) 366–0656.

SUPPLEMENTARY INFORMATION: The primary purpose of this meeting will be to prepare for the 40th session of the UNSCOE TDG. The 40th session of the UNSCOE TDG is the second of four meetings scheduled for the 2011–2012 biennium. The UNSCOE will consider proposals for the 18th Revised Edition of the United Nations Recommendations on the Transport of Dangerous Goods Model Regulations which will be implemented within relevant domestic, regional, and international regulations from January 1, 2015. Copies of proposals and the meeting agenda may be obtained from the United Nations Transport Division's Web site at: *http://www.unece.org/trans/main/dgdb/dgsubc/c32011.html.*

General topics on the agenda for the UNSCOE TDG meeting include:

- Listing, classification and packing
- Electric storage systems
- Miscellaneous proposals of amendments to the Model Regulations
- Electronic data interchange (EDI) for documentation purposes
- Cooperation with the International Atomic Energy Agency (IAEA)
- Global harmonization of transport of dangerous goods regulations
- Guiding principles for the Model Regulations
- Globally Harmonized System of Classification and Labeling of Chemicals (GHS)

In addition, PHMSA is soliciting comments on how to further enhance harmonization for international transport of hazardous materials. PHMSA has finalized a broad international strategic plan and

welcomes input on items which stakeholders believe should be included as specific initiatives within this plan. PHMSA's Office of International Standards Strategic Plan can be accessed at: *http://www.phmsa.dot.gov/hazmat/regs/international.*

Following the 40th session of the UNSCOE TDG, PHMSA will place a copy of the Sub-Committee's report and a summary of the results on PHMSA's Hazardous Materials Safety Web site at *http://www.phmsa.dot.gov/hazmat/regs/international.* PHMSA's site at *http://www.phmsa.dot.gov/hazmat/regs/international* provides additional information regarding the UNSCOE TDG and related matters such as summaries of decisions taken at previous sessions of the UNSCOE TDG.

Issued in Washington, DC, on November 2, 2011.

Magdy El-Sibaie,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 2011–28815 Filed 11–4–11; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 1089X]

Mississippi & Skuna Valley Railroad, LLC—Abandonment Exemption—in Yalobusha and Calhoun Counties, MS

On October 18, 2011, Mississippi & Skuna Valley Railroad, LLC (MSV) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon its entire 21-mile rail line extending between milepost 21.0 at Bruce Junction, and milepost 0.0 at Bruce, in Yalobusha and Calhoun Counties, Miss.[1] The line traverses United States Postal Service Zip Codes 38915 and 38922, and includes the stations of Bruce Junction (milepost 21.0) and Bruce (milepost 0.0).

MSV states that, based on information in its possession, the line does contain federally granted rights-of-way. Any documentation in MSV's possession will be made available promptly to those requesting it.

Where, as here, the carrier is abandoning its entire line, the Board generally does not impose labor protection under 49 U.S.C. 10502(g), unless the evidence indicates the existence of: (1) A corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. *See Honey Creek R.R.–Aban. Exemp.–in Henry Cnty., Ind.,* AB 865X (STB served Aug. 20, 2004); *Wellsville, Addison & Galeton R.R.–Aban. of Entire Line in Potter & Tioga Cntys., Pa.,* 354 I.C.C. 744 (1978); and *Northampton & Bath R.R.–Aban. near Northampton and Bath Junction, in Northampton Cnty., Pa.,* 354 I.C.C. 784 (1978). Therefore, if the Board grants the petition for exemption, in the absence of a showing of one or more of these exceptions, labor protective conditions will not be imposed. The Board will consider and address comments on the petition, including comments regarding labor protection, in its final decision on the merits.

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by February 3, 2012.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,500 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than November 28, 2011. Each trail use request must be accompanied by a $250 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to Docket No. AB 1089X, and must be sent to: (1) Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001; and (2) Melanie B. Yasbin, 600 Baltimore Ave., Suite 301, Towson, MD 21204. Replies to the petition are due on or before November 28, 2011.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–(800) 877–8339.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by OEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact OEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA generally will be within 30 days of its service.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: November 2, 2011.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2011–28757 Filed 11–4–11; 8:45 am]

BILLING CODE 4915–01–P

[1] MSV acquired the line in November 2010. *See Miss. & Skuna Valley R.R. LLC–Acq. & Operation Exemp.–Miss. & Skuna Valley R.R.,* FD 35429 (STB served Nov. 5, 2010). MSV states that no traffic was moving over the line at the time it was acquired from the Mississippi & Skuna Valley Railroad Company (MSVR), and before that no traffic had moved over the line since April 17, 2008.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. EP 552 (Sub-No. 15)]

Railroad Revenue Adequacy—2010 Determination

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of decision.

SUMMARY: On November 3, 2011, the Board served a decision announcing the 2010 revenue adequacy determinations for the Nation's Class I railroads. One carrier, Union Pacific Railroad Company, was found to be revenue adequate.

DATES: *Effective Date:* This decision is effective on November 3, 2011.

FOR FURTHER INFORMATION CONTACT: Paul Aguiar, (202) 245–0323. Assistance for the hearing impaired is available through Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Board is required to make an annual determination of railroad revenue adequacy. A railroad is considered revenue adequate under 49 U.S.C. 10704(a) if it achieves a rate of return on net investment equal to at least the current cost of capital for the railroad industry for 2010, determined to be 11.03% in *Railroad Cost of Capital—*

2010, Docket No. EP 558 (Sub-No. 14) (STB served Oct. 3, 2011). This revenue adequacy standard was applied to each Class I railroad. One carrier, Union Pacific Railroad Company, was found to be revenue adequate for 2010.

The decision in this proceeding is posted on the Board's Web site at *http://www.stb.dot.gov.* Copies of the decision may be purchased by contacting the Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238. Assistance for the hearing impaired is available through FIRS at (800) 877–8339.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: November 2, 2011.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2011–28748 Filed 11–4–11; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Funds Availability (NOFA) Inviting Applications for the Community Development Financial Institutions (CDFI) Program FY 2012 Funding Round (the FY 2012 Funding Round)

Announcement Type: Announcement of funding opportunity.

Catalog of Federal Domestic Assistance (CFDA) Number: 21.020.

DATES: Applications for Financial Assistance (FA) or Technical Assistance (TA) awards through the FY 2012 Funding Round must be received by midnight, Eastern Time (ET), January 11, 2012.

SUMMARY: *Executive Summary:* Subject to funding availability, this NOFA is issued in connection with the FY 2012 Funding Round of the CDFI Program, administered by the Community Development Financial Institutions (CDFI) Fund.

I. Funding Opportunity Description

A. Award Requirements

Through the CDFI Program, the CDFI Fund provides FA awards and TA grants. FA awards are made to certified CDFIs that complete and submit the CDFI Program Application and meet the requirements set forth in this NOFA, subject to funding availability. In FY 2012, subject to the availability of funding, the CDFI Fund will also make FA awards under the Healthy Food Financing Initiative (HFFI–FA) to certified CDFIs that meet the requirements set forth in this NOFA. TA grants are made to certified CDFIs and entities proposing to become certified that complete and submit the CDFI Program Application and meet the requirements set forth in this NOFA.

B. Program Regulations

The regulations governing the CDFI Program are found at 12 CFR parts 1805 and 1815 (the Regulations) and provide guidance on evaluation criteria and other requirements. Details regarding application content requirements are found in the Application and related materials. Each capitalized term in this NOFA is more fully defined in this NOFA, the Regulations, or the Application, and the CDFI Fund encourages Applicants to review the Regulations in addition to this NOFA.

C. The CDFI Fund reserves the right to fund, in whole or in part, any, all, or none of the applications submitted in response to this NOFA. The CDFI Fund reserves the right to reallocate funds from the amount that is anticipated to be available under this NOFA to other CDFI Fund programs, particularly if the CDFI Fund determines that the number of awards made under this NOFA is fewer than projected. In addition, the CDFI Fund invites applications that propose innovative Financial Products and Financial Services to address the current difficult economic conditions of our nation.

D. Coordination With Broader Community Development Strategies

Consistent with Federal efforts to promote community revitalization, it is important for communities to develop a comprehensive neighborhood revitalization strategy that addresses neighborhood assets that are essential to transforming distressed neighborhoods into healthy and vibrant communities of opportunity. Furthermore, only through the development of comprehensive neighborhood revitalization plans that embrace the coordinated use of programs and resources in order to effectively address the interrelated needs within a community will the broader vision of neighborhood transformation occur. Although not a requirement for participating in the CDFI Program, the Federal government believes that a CDFI will be most successful when it is part of, and contributing to, an area's broader neighborhood revitalization strategy.

II. Award Information

A. Funding Availability

1. FY 2012 Funding Round

Subject to funding availability, the CDFI Fund expects to award, through this NOFA, approximately $123 million in appropriated funds in the following ways: (i) $15 million in FA awards to Category I/SECA Applicants; (ii) $105 million in FA awards to Category II/Core Applicants; and (iii) $3 million in TA grants to TA Applicants. In addition, through this NOFA and the Native American CDFI Assistance (NACA) Program NOFA, the CDFI Fund expects to award approximately $25 million total in FA awards to HFFI Applicants under the CDFI and NACA Programs. The CDFI Fund reserves the right to award more or less than the amounts cited above in each category in the FY 2012 Funding Round, based upon available funding and other appropriate factors.

2. Availability of Funds for the FY 2012 Funding Round

Funds for the FY 2012 Funding Round have not yet been appropriated. If funds are not appropriated for the CDFI Program, there will not be a FY 2012 Funding Round. If funds are appropriated, the amount of such funds may be greater or less than the amounts set forth above. If funds for the FY 2012 Funding Round for the Native American CDFI Assistance (NACA) Program are not appropriated, entities eligible to apply for CDFI Program funds that would have applied for NACA Program funding, are encouraged to apply for CDFI Program funds through this NOFA.

B. Types of Awards

An Applicant may submit an application for a TA award or an FA award, which includes CDFI Program FA and HFFI–FA.

1. FA Awards

FA awards provide flexible financial support to CDFIs so they may achieve the strategies outlined in their Comprehensive Business Plans. FA awards can be used in the following six categories: (i) Financial Products; (ii) Financial Services; (iii) Development Services; (iv) Loan Loss Reserves; (v) Capital Reserves; and/or (vi) Operations. For purposes of this NOFA, the six categories mean:

TABLE 1—SIX CATEGORIES OF FA

(i) Financial Products	Loans, grants, equity investments, and similar financing activities, including the purchase of loans that the Applicant originates and the provision of loan guarantees, in the Applicant's Target Market, or for related purposes that the CDFI Fund deems appropriate (including administrative funds used to carry out Financial Products).
(ii) Financial Services	Checking and savings accounts, certified checks, automated teller machines services, deposit taking, remittances, safe deposit box services, and other similar services (including administrative funds used to carry out Financial Services).
(iii) Development Services	Activities that promote community development and help the Applicant provide its Financial Products and Financial Services, including financial or credit counseling, housing and homeownership counseling (pre- and post-), self-employment technical assistance, entrepreneurship training, and financial management skill-building (including administrative funds used to carry out Development Services).
(iv) Loan Loss Reserves	Funds set aside in the form of cash reserves, or through accounting-based accrual reserves, to cover losses on loans, accounts, and notes receivable made in the Target Market, or for related purposes that the CDFI Fund deems appropriate (including administrative funds used to carry out Loan Loss Reserves).
(v) Capital Reserves	Funds set aside as reserves to support the Applicant's ability to leverage other capital, for such purposes as increasing its net assets or serving the financing needs of its Target Market, or for related purposes that the CDFI Fund deems appropriate (including administrative funds used to carry out Capital Reserves).
(vi) Operations	Funds used to carry out the Comprehensive Business Plan, and/or for related purposes the CDFI Fund deems appropriate, that are not used to carry out or administer any of the foregoing eligible FA uses.

The CDFI Fund may provide FA awards in the form of equity investments (including secondary capital in the case of certain Insured Credit Unions), grants, loans, deposits, credit union shares, or any combination thereof. The CDFI Fund reserves the right, in its sole discretion, to provide an FA award in a form and amount other than that which the Applicant requests; however, the award amount will not exceed the Applicant's award request as stated in its application. FA awards must be used to support the Applicant's activities; FA awards cannot be used to support the activities of, or otherwise be passed through, transferred, or co-awarded to, third-party entities, whether Affiliates, Subsidiaries, or others. This includes certified CDFI bank holding companies that intend to transfer FA awards to their banks. Such transfers are not permitted. The entity that is to carry out the responsibilities of the award and deploy the award funds must be the entity that applies for the award.

2. Healthy Food Financing Initiative (HFFI) and HFFI–FA Awards

(a) *Overview.* The United States Department of Agriculture (USDA), Health and Human Services (HHS), and the United States Department of the Treasury are working together to support projects that increase access to healthy, affordable food in low-income neighborhoods that lack access to healthy food options. As part of a coordinated effort called the Healthy Food Financing Initiative (HFFI), these three departments will aim to expand the availability of nutritious food through the establishment of healthy food retail outlets, including developing and equipping grocery stores, small retailers, corner stores, and farmers markets to help revitalize neighborhoods that currently lack these options.

In addition to the CDFI and NACA Programs, the HFFI includes: (i) The New Markets Tax Credit (NMTC) Program, also administered by the CDFI Fund; (ii) the Community and Economic Development (CED) Program, which HHS administers; and (iii) several programs that USDA administers including, among others, the Business and Industry (B&I) Program and the Intermediary Relending Program (IRP). Each of these programs provides a unique mechanism to support initiatives aimed at increasing access to healthy food. When these programs are combined, public dollars can act far more effectively as a market catalyst by providing the full range of financing to local actors—a key step to addressing the problem of limited access to affordable and nutritious food. Instead of approaching this problem through separate agency and program silos, the HFFI will use a collaborative approach involving the resources of all three agencies.

For more information about this initiative, please visit the HFFI Web site at *http://www.usda.gov/fooddeserts.*

(b) *HFFI–FA Awards.* In FY 2012, subject to appropriations, the CDFI Fund may award up to $25 million of HFFI–FA awards through the CDFI and NACA Programs. The CDFI Fund expects to make HFFI–FA awards of up to $3.5 million to certified CDFIs that submit and complete the CDFI/NACA Program Application and the HFFI–FA Supplemental Questionnaire. The HFFI–FA Supplemental Questionnaire will only be sent to those applicants indicating in their FY 2012 application that they intend to apply for an HFFI–FA award. The CDFI Fund reserves the right to make awards less than or greater than $3.5 million based upon the questionnaires received and the funds available. The FY 2012 HFFI–FA supplemental questionnaire will not likely be finalized and made available to prospective applicants until after the FY 2012 CDFI Program Application deadline. However, a copy of the FY 2011 HFFI–FA supplemental questionnaire is available for review on the CDFI Fund's Web site at *http// www.cdfifund.gov.*

HFFI–FA awards will be provided as a supplement to FA awards; therefore, only those applicants that have been selected to receive an FA award under the FY 2012 CDFI or NACA Funding Round will be eligible to receive an HFFI–FA award. Such applicants will be rated and scored separately based upon the HFFI–FA supplemental questionnaire responses. HFFI–FA Applicants will be rated, among other elements, on the extent of community need, the quality of their HFFI–FA strategy, and their capacity to execute that strategy. The CDFI Fund will collaborate with the other Federal agencies involved in the HFFI prior to making final award selections. The CDFI Fund may, at its discretion, perform additional due diligence on Applicants for this initiative. HFFI–FA awards must be used to support the Applicant's activities; the awards cannot be used to support the activities of, or otherwise be passed through, transferred, or co-awarded to, third-party entities, whether Affiliates, Subsidiaries, or others. This includes the transfer of an award from a Bank Holding Company to a Bank subsidiary.

3. TA Grants

(a) The CDFI Fund provides TA as a grant and reserves the right, in its sole

discretion, to provide a grant for uses and amounts other than that which the Applicant requests; however, the grant amount will not exceed the Applicant's request as stated in its application and the applicable budget chart.

(b) For purposes of this NOFA, TA eligible uses are: (i) Personnel/salary; (ii) personnel/fringe; (iii) professional services; (iv) travel; (v) training; (vi) equipment; (vii) materials/supplies; and (viii) other costs. (Please see the Application for details on TA uses.) TA grants must be used to support the Applicant's capacity building activities. TA grants cannot be used to support the activities of, or otherwise be passed through, transferred, or co-awarded to, third-party entities, whether Affiliates, Subsidiaries, or others. This includes the transfer of an award from a Bank Holding Company to a Bank subsidiary.

C. Assistance Agreement

Each Awardee under this NOFA must sign an Assistance Agreement before the CDFI Fund will disburse an award or grant. The Assistance Agreement contains the Award's terms and conditions. For further information, see Section VI.A of this NOFA.

III. Eligibility Information

A. Eligible Applicants

The Regulations specify the eligibility requirements each Applicant must meet in order to be eligible to apply for assistance under this NOFA. CDFI Program Applicants may apply as either an FA applicant or a TA applicant, but not both. If an Applicant applies for both types of awards, it is in the sole discretion of the CDFI Fund to disqualify the Applicant from competing for either an FA award or a TA grant or to decide to give the Applicant either an FA award or a TA grant.

1. FA Applicant Categories

All FA Applicants must meet the criteria listed in Table 2. (Applicants requesting FA funding in excess of the allowable amount for Category I will be classified as Category II Applicants, regardless of their total assets, years in operation, or prior CDFI Fund awards.)

TABLE 2—FA APPLICANT CRITERIA

FA applicant category	Applicant criteria	Applicant may apply for:
Category I/Small and/or Emerging CDFI Assistance (SECA).	(1) Is a Certified/Certifiable CDFI ..... (2) As of the end of the Applicant's most recent fiscal year end or September 30, 2011, has total assets as follows: • Insured Depository Institutions and Depository Institution Holding Companies: up to $250 million • Insured Credit Unions: up to $10 million • Venture capital funds: up to $10 million • Other CDFIs: up to $5 million **OR** (3) Began operations * on or after January 1, 2008	Up to and including $600,000 in FA funds and up to and including $3.5 million in FA funds under the HFFI–FA.
Category II/Core	A Certified/Certifiable CDFI that meets all other eligibility requirements described in this NOFA.	Up to and including $2 million in FA funds; and up to and including $3.5 million in FA funds under the HFFI–FA.

* The term ''began operations'' is defined as the financing activity start date indicated in the Applicant's myCDFIFund account.

2. TA Applicants

All TA Applicants must meet the following criteria:

TABLE 3—TA APPLICANT CRITERIA

Applicant type	Criteria of applicant	Applicant can apply for:
TA	A Certified CDFI, a Certifiable CDFI, or an Emerging CDFI.	Up to $100,000 for capacity-building activities.

3. CDFI Certification Requirements

For purposes of this NOFA, eligible FA Applicants include Certified CDFIs and Certifiable CDFIs; eligible TA Applicants include Certified CDFIs, Certifiable CDFIs, and Emerging CDFIs, defined as follows:

TABLE 4—CDFI CERTIFICATION REQUIREMENTS DEFINITIONS

(a) Certified CDFI	An entity the CDFI Fund has officially notified that it meets all CDFI certification requirements as of this NOFA's publication date. CDFIs that have received official notification from the CDFI Fund that their certification has expired or been terminated are not eligible to apply as Certified. If the CDFI Fund has provided certified CDFIs with written notification that their certifications had been extended, the CDFI Fund will consider the extended certification dates to determine whether those certified CDFIs meet this eligibility requirement.

TABLE 4—CDFI CERTIFICATION REQUIREMENTS DEFINITIONS—Continued

(b) Certifiable CDFI	An entity that has submitted an application to the CDFI Fund demonstrating it meets the CDFI certification requirements but the CDFI Fund has not yet officially certified the entity. If the CDFI Fund is unable to certify an Applicant and the Applicant is selected for an FA award, the CDFI Fund may, in its sole discretion, terminate the award commitment. The CDFI Fund will not enter into an Assistance Agreement or disburse FA award funds unless and until an Applicant is Certified. The CDFI Certification application can be found on the CDFI Fund's Web site at *http://www.cdfifund.gov.* Certifiable Applicants must have submitted a certification application as of the date indicated in Section IV.F of this NOFA to be eligible for FA in the FY 2012 round.
(c) Emerging CDFI	An entity that demonstrates to the CDFI Fund it has an acceptable plan to become Certified by December 31, 2013, or another date selected by the CDFI Fund. Emerging CDFIs may only apply for TA grants; they are not eligible to apply for FA awards. Each Emerging CDFI selected to receive a TA grant will be required, pursuant to its Assistance Agreement with the CDFI Fund, to become certified as a CDFI by a specified date.
(d) Material Events Form	Certified applicants must submit a certification of Material Events form if they have experienced a material event. A ''material event'' is an occurrence that affects an organization's strategic direction, mission, or business operation and, thereby, its status as a Certified CDFI and/or its compliance with the terms and conditions of an Assistance Agreement. Please see Section IV in this NOFA for deadlines to submit material events forms. The material events form can be found on the CDFI Fund's Web site at *http://www.cdfifund.gov.*
(e) Other Targeted Populations as Target Markets.	Other Targeted Populations are defined as identifiable groups of individuals in the Applicant's service area for which there exists strong evidence that they lack access to loans, equity investments, and/or Financial Services. The CDFI Fund has determined there is strong evidence that the following groups of individuals lack access to such products and services on a national level or within their recognized ancestral areas: (i) Native Americans or American Indians, including Alaska Natives living in Alaska; (ii) Blacks or African Americans; (iii) Hispanics or Latinos; (iv) Native Hawaiians living in Hawaii; and (v) other Pacific Islanders living in other Pacific Islands. An Applicant designating any of the above-cited Other Targeted Populations is not required to provide additional narrative explaining their lack of access to loans, equity investments, or Financial Services. To define these populations for the purposes of this NOFA, the CDFI Fund is using the following definitions, set forth in the Office of Management and Budget (OMB) Notice, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity (October 30, 1997), as amended and supplemented: (a) American Indian, Native American, or Alaska Native: A person having origins in any of the original peoples of North and South America (including Central America) and who maintains tribal affiliation or community attachment; (b) Black or African American: A person having origins in any of the black racial groups of Africa (terms such as Haitian or Negro can be used in addition to Black or African American); (c) Hispanic or Latino: A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race (the term Spanish origin can be used in addition to Hispanic or Latino); (d) Native Hawaiian: A person having origins in any of the original peoples of Hawaii; and (e) Other Pacific Islander: A person having origins in any of the original peoples of Guam, Samoa or other Pacific Islands.

4. Limitation on Awards

An Applicant may receive only one award under this FY 2012 NOFA. An Applicant may receive only one award through the FY 2012 CDFI Program Funding Round or the FY 2012 NACA Program Funding Round.

B. Prior Awardees

For purposes of this section, the CDFI Fund will consider an Affiliate to be any entity that meets the definition of Affiliate in the Regulations or any entity otherwise identified as an Affiliate by the Applicant in its funding application and/or its myCDFIFund account. Prior awardees should note the following:

1. *$5 Million Funding Cap:* Congress waived the $5 million funding cap (i.e., the prohibition that an applicant and its Affiliates cannot collectively receive more than $5 million in CDFI Program awards over a three year period) for each of the FY 2009, FY 2010 and the FY 2011 funding rounds, and it is possible that the $5 million funding cap may be waived for the FY 2012 Funding Round. However, as of this NOFA's publication date such a waiver has not been enacted into law. Accordingly, the CDFI Fund is currently prohibited from obligating more than $5 million in assistance, in the aggregate, to any one organization and its Subsidiaries and Affiliates during any three-year period. In general, the three-year period calculated for the cap extends back three years from the Effective Date of the Assistance Agreement between the Awardee and the CDFI Fund. However, for purposes of this NOFA, because the funding cap was waived for 2009, 2010, and 2011, the CDFI Fund will only include assistance in the cap calculation that will be provided to an Applicant (or its Subsidiaries or Affiliates) in the FY 2012 Funding Round. This means if a waiver of the funding cap is not enacted, Applicants and their Subsidiaries and Affiliates will be limited to a maximum award of $5 million in FA, HFFI–FA, and TA funds in FY 2012. The CDFI Fund will assess the $5 million funding cap applicability during the award selection phase if a Congressional waiver has not been enacted by that time.

Please see Table 5 for other Prior Awardee Requirements and Considerations:

TABLE 5—PRIOR AWARDEE REQUIREMENTS AND CONSIDERATIONS

Prior awardee situation	Requirements and considerations
Failure to Meet Reporting Requirements	The CDFI Fund will not consider an application if the Applicant or its Affiliate is a prior Awardee/Allocatee under any CDFI Fund program and is not current on the reporting requirements set forth in a previously executed assistance, allocation, or award agreement(s), as of this NOFA's application deadline. The CDFI Fund only acknowledges receipt of reports that are complete; incomplete reports or reports that are deficient of required elements will not be considered as having been received.
Pending Resolution of Noncompliance	It is in the CDFI Fund's sole discretion to consider the Applicant's application pending until full resolution of a noncompliance issue if the Applicant, is a prior Awardee/Allocatee under any CDFI Fund program and if: (i) The entity has submitted reports to the CDFI Fund indicating noncompliance with a previously executed agreement with the CDFI Fund, and (ii) the CDFI Fund has yet to make a final determination as to whether the entity is in default of its previously executed agreement.
Default Status:	The CDFI Fund will not consider an application if an Applicant is a prior Awardee/Allocatee under any CDFI Fund program and is in default of a previously executed agreement with the CDFI Fund at the time that the application is due under this NOFA. Such entities will be ineligible to apply for an award under this NOFA as long as the Applicant or its Affiliate's prior award or allocation remains in default status or such other time period as the CDFI Fund has specified in writing.
Termination in Default:	The CDFI Fund will not consider an application if an Applicant is a prior Awardee/Allocatee under any CDFI Fund program and the CDFI Fund has made a final determination that the Awardee/Allocatee's prior award was terminated in default: (i) Within the 12-month period prior to this NOFA's application deadline, and (ii) the final reporting period end date for the applicable terminated award falls within the 12-month period prior to this NOFA's application deadline.
Undisbursed Award Funds:	The CDFI Fund encourages Applicants with undisbursed funds to request the undisbursed funds from the CDFI Fund at least 10 business days prior to this NOFA's application deadline. The CDFI Fund will not consider an application if the Applicant is an Awardee under any CDFI Fund program and has undisbursed award funds (as defined below) as of this NOFA's application deadline. The CDFI Fund will include the combined undisbursed prior awards, as of this NOFAs application deadline, of the Applicant and its affiliated entities, including those in which the affiliated entity Controls the Applicant, is Controlled by the Applicant, or shares common management officials with the Applicant as the CDFI Fund determines.
• *BEA Program Undisbursed Awards Calculations:*	For the BEA Program, undisbursed award funds will be included in the calculation of undisbursed awards for the Applicant and any three to five calendar years prior to the end of the calendar year of this NOFA's application deadline. For purposes of this NOFA, therefore, undisbursed awards made in FYs 2006, 2007, and 2008 will be included in the calculation for the Applicant's undisbursed award amounts if the funds have not been disbursed as of this NOFA's application deadline.
• *CDFI Program Undisbursed Awards Calculations:*	The CDFI Program undisbursed funds will be calculated by adding all undisbursed award amounts made to the Applicant two to five calendar years prior to the end of the calendar year of this NOFA. Therefore, undisbursed CDFI Program awards made in FYs 2006, 2007, 2008, and 2009 will be included in the undisbursed calculation as of this NOFA's application deadline.
• *Undisbursed Award Calculations:*	Undisbursed awards cannot exceed five percent of the total includable awards for the Applicant's BEA/CDFI/NACA awards, as of this NOFA's application deadline. (The total ''includable'' award amount is the total award amount from the relevant CDFI Fund program.) Please refer to an example of this calculation on the CDFI Fund's Web site, found in the Q&A document for the FY 2012 Funding Round. The ''undisbursed award funds'' calculation does not include: (i) Tax credit allocation authority made available through the NMTC Program; (ii) award funds that the Awardee has requested from the CDFI Fund by submitting a full and complete disbursement request before this NOFA's application deadline; (iii) award funds for an award that the CDFI Fund has terminated or de-obligated; or (iv) award funds for an award that does not have a fully executed assistance or award agreement.

2. Contact the CDFI Fund

Applicants that are prior CDFI Fund Awardees are advised to: (i) Comply with requirements specified in assistance, allocation, and/or award agreement(s), and (ii) contact the CDFI Fund to ensure necessary actions are underway for the disbursement or de-obligation of any prior outstanding award balance(s) as referenced above. An Applicant that is unsure about the disbursement status of any prior award should contact the CDFI Fund by sending an email to *CDFI.disburseinquiries@cdfi.treas.gov.*

C. Matching Funds

1. Matching Funds Requirements in General

FA Applicants must obtain non-Federal matching funds, on the basis of not less than one dollar for each dollar of FA funds the CDFI Fund provides. (This requirement pertains to FA Applicants only; matching funds are not required for TA Applicants). Matching funds must be comparable in form and value to the FA award. This means that if an Applicant is requesting an FA award, the Applicant must show it has obtained matching funds through commitment(s) from non-Federal sources that are equal to the amount requested from the CDFI Fund. Applicants cannot use matching funds from a prior FA award under the CDFI Program or under another federal grant or award program to satisfy the matching funds requirement of this

NOFA. If an Applicant seeks to use matching funds from an organization that was a prior Awardee under the CDFI Program, the CDFI Fund will deem such funds as federal funds, unless the funding entity establishes and the CDFI Fund agrees, that such funds do not consist, in whole or in part, of CDFI Program funds or other federal funds. The CDFI Fund encourages Applicants to review the Regulations at 12 CFR 1805.500 *et seq.* and matching funds guidance materials on the CDFI Fund's Web site for further information.

2. The CDFI Fund will not consider any FA Applicant for an award that has no matching funds in-hand or firmly committed as of this NOFA's application deadline. Specifically, FA Applicants must meet the following matching funds requirements:

(a) *Category I/SECA:* A Category I/SECA Applicant must demonstrate that it has eligible matching funds equal to no less than 25 percent of the FA amount requested in-hand or firmly committed, on or after January 1, 2010, and on or before the application deadline. The CDFI Fund reserves the right to rescind all or a portion of an FA award and re-allocate the rescinded award amount to other qualified Applicant(s), if an Applicant fails to obtain in-hand 100 percent of the required matching funds by March 14, 2013 (with required documentation of such receipt received by the CDFI Fund not later than March 31, 2013). The CDFI Fund may grant an extension of such matching funds deadline for specific Applicants selected to receive FA awards, if the CDFI Fund deems it appropriate. For any Applicant that demonstrates it has less than 100 percent of matching funds in-hand or firmly committed as of the application deadline, the CDFI Fund will evaluate the Applicant's ability to raise the remaining matching funds by March 14, 2013.

(b) *Category II/Core Applicants:* A Category II/Core Applicant must demonstrate that it has eligible matching funds equal to no less than 25 percent of the amount of the FA award requested in-hand or firmly committed, on or after January 1, 2010 and on or before the application deadline. The CDFI Fund reserves the right to rescind all or a portion of an FA award and re-allocate the rescinded award amount to other qualified Applicant(s), if an Applicant fails to obtain in-hand 100 percent of the required matching funds by March 14, 2013 (with required documentation of such receipt received by the CDFI Fund not later than March 31, 2013). The CDFI Fund may grant an extension of such matching funds deadline for specific Applicants selected to receive FA, if the CDFI Fund deems it appropriate. For any Applicant that demonstrates it has less than 100 percent of matching funds in-hand or firmly committed as of the application deadline, the CDFI Fund will evaluate the Applicant's ability to raise the remaining matching funds by March 14, 2013.

(c) *HFFI–FA Applicants:* It is possible that the matching funds requirements for HFFI–FA awards may be waived for the FY 2012 Funding Round. However, as of this NOFA's publication such a waiver has not been enacted. An Applicant requesting an HFFI–FA award that does not include matching funds documentation in its application will be deemed ineligible for funding under the FY 2012 Funding Round if a matching funds waiver is not enacted. An Applicant requesting an HFFI–FA award that would not satisfy the matching funds requirements but is otherwise eligible under this NOFA may wish to submit an application in the event a matching funds waiver is enacted.

Accordingly, subject to the immediately preceding paragraph: A HFFI–FA Applicant must demonstrate that it has eligible matching funds equal to no less than 25 percent of the FA amount requested in-hand or firmly committed, on or after January 1, 2010, and on or before the deadline for the submitting the HFFI–FA supplemental questionnaire. The CDFI Fund reserves the right to rescind all or a portion of an FA award and re-allocate the rescinded award amount to other qualified Applicant(s), if an Applicant fails to obtain in-hand 100 percent of the required matching funds by March 14, 2013 (with required documentation of such receipt received by the CDFI Fund not later than March 31, 2013). The CDFI Fund may grant an extension of such matching funds deadline for specific Applicants selected to receive FA awards, if the CDFI Fund deems it appropriate. For any Applicant that demonstrates it has less than 100 percent of matching funds in-hand or firmly committed as of the application deadline, the CDFI Fund will evaluate the Applicant's ability to raise the remaining matching funds by March 14, 2013.

3. Matching Funds Terms Defined; Required Documentation

TABLE 6—MATCHING FUNDS DEFINITIONS

Type of matching funds	Definition
(a) *Matching funds "in-hand"*	The Applicant has actually received disbursement of the matching funds and provides to the CDFI Fund acceptable written documentation, showing the source, form, and amount of the matching funds (*i.e.,* grant, loan, deposit, and equity investment). Applicants must provide copies of the following documentation depending on the type of award being requested: (i) Loans—the loan agreement and promissory note; (ii) grant—the grant letter or agreement for all grants of $50,000 or more; (iii) equity investment—the stock certificate and any related shareholder agreement. The Applicant must also provide acceptable documentation that demonstrates receipt of the matching funds, such as a copy of a check or a wire transfer statement.
(b) Matching Funds "*firmly committed*"	The Applicant has entered into or received a legally binding commitment from the matching funds source showing the funds will be disbursed to the Applicant. The Applicant must also provide acceptable written documentation showing the source, form, and amount of the firm commitment (and, in the case of a loan, the terms thereof), as well as the anticipated disbursement date of the committed funds.

4. The CDFI Fund may contact the matching funds source to discuss the matching funds and the documentation that the Applicant has provided. If the CDFI Fund determines that any portion of the Applicant's matching funds is ineligible under this NOFA, the CDFI Fund, in its sole discretion, may permit the Applicant to offer alternative matching funds as a substitute for the ineligible matching funds. In such instances: (i) The Applicant must

provide acceptable alternative matching funds documentation within two business days of the CDFI Fund's request, and (ii) the alternative matching funds documentation will not increase the total amount of FA the Applicant requested.

5. Special Rule for Insured Credit Unions

The Regulations allow an Insured Credit Union to use retained earnings to serve as matching funds for an FA award in an amount equal to: (i) The increase in retained earnings that has occurred over the Applicant's most recent fiscal year; (ii) the annual average of such increases that has occurred over the Applicant's three most recent fiscal years; or (iii) the entire retained earnings that have been accumulated since the inception of the Applicant, as provided in the Regulations. For purposes of this NOFA, if option (iii) is used, the Applicant must increase its member and/or non-member shares or total loans outstanding by an amount equal to the amount of retained earnings committed as matching funds. This increase must occur by the end of the Awardee's second performance period, as set forth in its Assistance Agreement, and will be based on amounts reported in the Applicant's Audited or Reviewed Financial Statements or NCUA Form 5300 Call Report. The CDFI Fund will assess the likelihood of this increase during the application review process. An award will not be made to any Applicant that has not demonstrated in the relevant Financial Statements or NCUA Call Report that it has increased shares or loans by at least 25 percent of the requested FA award amount between December 31, 2010, and December 31, 2011.

IV. Application and Submission Information

A. Application Submission

Under this NOFA, all Applicants must submit their applications electronically through Grants.gov. The CDFI Fund will not accept applications through myCDFIFund accounts nor will applications be accepted via email, mail, facsimile, or other forms of communication, except in circumstances approved by the CDFI Fund beforehand.

B. Grants.gov

In compliance with Public Law 106–107 and Section 5(a) of the Federal Financial Assistance Management Improvement Act, the CDFI Fund is required to accept applications submitted through the Grants.gov electronic system. The CDFI Fund strongly recommends Applicants start the registration process as soon as possible and visit *http://www.grants.gov* immediately. Applicants that have used Grants.gov in the past must verify that their registration is current and active. New applicants must properly register, which may take several weeks to complete. Pursuant to OMB guidance (68 FR 38402), each Applicant must provide, as part of its application submission, a Dun and Bradstreet Data Universal Numbering System (DUNS) number. In addition, each application must include a valid and current Employer Identification Number (EIN). An electronic application that does not include either a DUNS or an EIN is incomplete and may not be transmitted to the CDFI Fund from Grants.gov. As a result, Applicants without a DUNS or EIN should allow sufficient time for the IRS and/or Dun and Bradstreet to respond to inquiries and/or requests for identification numbers.

The CDFI Fund will not consider Applicants that fail to properly register in Grants.gov or to confirm they are properly registered and as a result, are unable to submit their applications before the deadline. Applicants are reminded that the CDFI Fund does not maintain the Grants.gov registration or submittal process so Applicants must contact Grants.gov directly for issues related to that aspect of the application submission process. Please see the following link for information on getting started on Grants.gov: *http://grants.gov/applicants/organization_registration.jsp*

C. myCDFIFund Accounts

myCDFIFund is the CDFI Fund's primary means of communication with Applicants. Applicants are responsible for ensuring their myCDFIFund account is updated at all times. All Applicants must register as an organization and as a user with myCDFIFund before the application deadline. Applicants failing to properly register and update their myCDFIFund accounts may miss important communication with the CDFI Fund that could impact their application. For more information on myCDFIFund, please see the ''Frequently Asked Questions'' link posted at *https://www.cdfifund.gov/myCDFI/Help/Help.asp.*

D. Application Content Requirements

The Application and related documents can be found on the Grants.gov and the CDFI Fund's Web sites. The CDFI Fund anticipates posting the Application and related documents to the CDFI Fund's Web site on the same day that the NOFA is released or shortly thereafter. Once an application is submitted to Grants.gov, the Applicant will not be allowed to change any element of the application. The CDFI Fund, however, may contact the Applicant to clarify or confirm application information.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act (44 U.S.C. chapter 35), an agency may not conduct or sponsor a collection of information, and an individual is not required to respond to a collection of information, unless it displays a valid OMB control number. Pursuant to the Paperwork Reduction Act, the CDFI Program funding Application has been assigned the following control number: 1559–0021.

F. Application Deadlines

1. Please see the following table for critical deadlines that are relevant to the FY 2012 Funding Round. All times listed are Eastern Standard Time (ET):

TABLE 7—FY 2012 FUNDING ROUND APPLICATION CRITICAL DATES

Description	Date due	Time
Certification application	December 14, 2011	5:00 p.m.
Certification Material Events Form	December 14, 2011	5:00 p.m.
Last day to contact Program staff	January 9, 2012	5:00 p.m.
Last day to contact Compliance staff	January 9, 2012	5:00 p.m.
Combined Program Application	January 11, 2012	midnight.

2. Late Delivery

The CDFI Fund will not accept an application, nor any portion of an application, delivered after the application deadline. The CDFI Fund will not grant exceptions or waivers. Any application that is deemed ineligible or rejected will not be returned to the Applicant.

G. Intergovernmental Review

Not applicable.

H. Funding Restrictions

For allowable uses of FA proceeds, please see the Regulations at 12 CFR 1805.301.

V. Application Review Information

A. Format

Applicants must complete, and the CDFI Fund will only accept, the Application as provided in Grants.gov and the CDFI Fund's Web site. The FY 2012 Application is a fillable electronic PDF form, with pre-set text limits and font size restrictions. Applicants should not submit information that has not been specifically requested in this NOFA or the Application. Applicants should not submit documents such as strategic plans or market studies unless the CDFI Fund has specifically requested such documents in the Application.

B. Review and Selection Process

1. Eligibility and Completeness Review

The CDFI Fund will review each application to determine whether it is complete and the Applicant meets the eligibility requirements described in Section III of this NOFA. An incomplete application or one that does not meet eligibility requirements will be rejected.

2. Substantive Review

If the Applicant has submitted a complete and eligible application, the CDFI Fund will conduct a substantive review in accordance with the criteria and procedures described in the Regulations, this NOFA, and the Application guidance. The CDFI Fund reserves the right to contact the Applicant by telephone, email, or mail for the sole purpose of clarifying or confirming application information. If contacted, the Applicant must respond within the CDFI Fund's time parameters or run the risk of their application being rejected.

3. Application Scoring and Award Selection (FA and TA Applicants)

(a) *Application Scoring:* The CDFI Fund will evaluate each application on the criteria categories and the scoring scale described in the Application. An Applicant must receive a minimum score in each evaluation criteria in order to be considered for an award. The CDFI Fund will score each part as indicated in the following table:

TABLE 8—APPLICATION SCORING CRITERIA

Application parts	Scoring points
Financial Assistance (FA) Applicants	
High Impact Narrative	10
Target Market Needs**	10
Responsiveness to Target Market Needs	40
Delivery Capacity	40
TOTAL POINTS	100
Technical Assistance (TA) Applicants	
Technical Assistance Proposal	20
Target Market Needs	10
Responsiveness to Target Market Needs	30
Delivery Capacity	40
TOTAL POINTS	100

** Includes up to 4 points based on a quantitative distress index for FA applicants only.

(b) In the FY 2012 Funding Round, the CDFI Fund will allow FA Applicants to earn up to 4 extra distressed points for serving eligible highly distressed target markets. Such markets are identified by a quantitative index of distress based on high poverty rates, high unemployment rates, low median family income, and for non-Metro areas, population loss. Applicants can identify distressed markets by using the index, which identifies the most distressed markets with the highest rank number. The index is posted to the CDFI Fund's Web site at *http://www.cdfifund.gov/distressindex.* Applicants will be required to deploy award funds into the distressed markets as identified in the application and for which distressed points were awarded.

(c) Applicants whose activities are part of a broader neighborhood revitalization strategy and/or that target marginalized or isolated populations will be scored more favorably under the section of the application pertaining to ''Responsiveness to Target Market Needs.''

(d) *Evaluating Prior Award Performance:* The CDFI Fund will deduct points for any Applicant that is a prior awardee or allocatee of any CDFI Fund program if the Applicant: (i) is noncompliant with any active award or award that terminated in the current calendar year by failing to meet performance goals and measures, reporting deadlines, or other requirements set forth in the CDFI Fund's assistance, allocation, or award agreement(s) during the Applicant's two complete fiscal years prior to this NOFA's application deadline; (ii) failed to make timely loan payments to the CDFI Fund during the Applicant's two complete fiscal years prior to this NOFA's application deadline (if applicable); and (iii) did not perform on any prior assistance, allocation, or award agreement, which is determined during the application review process. In addition, the CDFI Fund will deduct points if an FA Applicant had funds de-obligated for FA awards issued in FY 2009, 2010 or 2011 if: (i) The amount of de-obligated funds is at least $200,000 and (ii) the de-obligation occurred within the 12 months prior to this NOFA's application deadline. Point deductions for a de-obligation in this

funding round will not be counted against future FA applications. The CDFI Fund has the sole discretion to deduct points from prior Awardees/Allocates if those Applicants have proceedings instituted against them in, by, or before any court, governmental, agency, or administrative body and has received a final determination within the last three years indicating the Applicant has discriminated on the basis of race, color, national origin, disability, age, marital status, receipt of income from public assistance, religion, or sex.

(e) *Award Selection:* The CDFI Fund will make its final award selections based on the Applicants' scores, ranked from highest to lowest, and the amount of funds available. In the case of tied scores, Applicants will be ranked first according to each Applicant's Delivery Capacity score; then the number of distressed points indicated. TA Applicants, Category I, and Category II Applicants will be grouped and ranked separately. In addition, the CDFI Fund may consider the institutional and geographic diversity of Applicants when making its funding decisions.

4. Insured CDFIs

In the case of Insured Depository Institutions and Insured Credit Unions, the CDFI Fund will consider the views of the Appropriate Federal Banking Agencies. Throughout the award review process, the CDFI Fund will consult with the Appropriate Federal Banking Agency about the Applicant's financial safety and soundness. If the Appropriate Federal Banking Agency identifies safety and soundness concerns, the CDFI Fund will assess whether the concerns cause or will cause the Applicant to be incapable of undertaking the activities for which funding has been requested. If it is determined the Applicant is incapable of meeting its obligations, the CDFI Fund reserves the right to rescind the award decision. The CDFI Fund also reserves the right to require insured CDFI Applicants to improve safety and soundness conditions prior to receiving an award disbursement. In addition, the CDFI Fund will take into consideration Community Reinvestment Act assessments of Insured Depository Institutions and/or their Affiliates.

5. Award Notification

Each Applicant will be informed of the CDFI Fund's award decision through a notification in the Applicant's myCDFIFund account. This includes notification to Applicants that have not been selected for an award if the decision is based on reasons other than completeness or eligibility. Applicants that have not been selected for an award will receive a debriefing in their myCDFIFund account. The CDFI Fund will provide this feedback in a format and within a timeframe dependent on available resources.

6. Application Rejection

The CDFI Fund reserves the right to reject an application if information (including administrative errors) comes to the CDFI Fund's attention that either adversely affects an Applicant's eligibility for an award, adversely affects the CDFI Fund's evaluation or scoring of an application, or indicates fraud or mismanagement on the Applicant's part. If the CDFI Fund determines any portion of the application is incorrect in a material respect, the CDFI Fund reserves the right, in its sole discretion, to reject the application. The CDFI Fund reserves the right to change its eligibility and evaluation criteria and procedures, if the CDFI Fund deems it appropriate. If the changes materially affect the CDFI Fund's award decisions the CDFI Fund will provide information about the changes through the CDFI Fund's Web site. The CDFI Fund's award decisions are final and there is no right to appeal the decisions.

VI. Award Administration Information

A. Assistance Agreement

Each Applicant selected to receive an award under this NOFA must enter into an Assistance Agreement with the CDFI Fund in order to receive disbursement of the award funds. The Assistance Agreement will set forth the award terms and conditions, including but not be limited to the award: (i) Amount; (ii) type; (iii) uses; (iv) targeted market or activities; (v) performance goals and measures; and (vi) reporting requirements. FA Assistance Agreements will usually have three-year performance periods; TA Assistance Agreements will usually have two-year performance periods. All FA and TA awardees that are not Insured CDFIs will be required to provide the CDFI Fund with a Certificate of Good Standing from the Secretary of State for the Awardee's state of incorporation. This certificate can often be acquired online on the secretary of state Web site for the Awardee's state of incorporation and must generally be dated within 270 days of the date the Awardee executes the Assistance Agreement. Due to considerable backlogs in state government offices, Applicants are advised to submit requests for Certificates of Good Standing at the time that they submit their applications. If prior to entering into an Assistance Agreement with the CDFI Fund, information (including administrative error) comes to the CDFI Fund's attention that either adversely affects the Awardee's eligibility for an award, or adversely affects the CDFI Fund's evaluation of the Awardee's application, or indicates fraud or mismanagement on the Awardee's part, the CDFI Fund may, in its discretion and without advance notice to the Awardee, terminate the award or take such other actions as it deems appropriate. Moreover, if prior to entering into an Assistance Agreement, the CDFI Fund determines that the Awardee or an Affiliate of the Awardee is in default of any previously executed agreement with the CDFI Fund, the CDFI Fund may, in its discretion and without advance notice to the Awardee, either terminate the award or take such other actions as it deems appropriate. For purposes of this section, the CDFI Fund will consider an Affiliate to mean any entity that meets the definition of Affiliate in the Regulations or is otherwise identified by the Awardee as an Affiliate. The CDFI Fund reserves the right, in its sole discretion, to rescind an award if the Awardee fails to return the Assistance Agreement, signed by the authorized representative of the Awardee, and/or provide the CDFI Fund with any other requested documentation, within the CDFI Fund's deadlines.

1. Failure To Meet Reporting Requirements

If an Awardee is a prior Awardee/Allocatee under any CDFI Fund program and is not current with the reporting requirements set forth in the previously executed agreement(s) with the CDFI Fund, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Assistance Agreement until the Awardee/Allocatee is current with the reporting requirements. Please note that the CDFI Fund only acknowledges the receipt of reports that are complete. As such, incomplete reports or reports that are deficient of required elements will not be recognized as having been received. If said prior Awardee/Allocatee is unable to meet this requirement within the timeframe the CDFI Fund sets, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the Assistance Agreement and the award made under this NOFA.

2. *Pending Resolution of Noncompliance*

If an Applicant is a prior Awardee under any CDFI Fund program and if: (i) it has submitted reports to the CDFI

Fund that demonstrate noncompliance with a previous executed agreement with the CDFI Fund; and (ii) the CDFI Fund has yet to make a final determination as to whether the entity is in default of its agreement, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Assistance Agreement, pending full resolution of the noncompliance issue to the CDFI Fund's satisfaction. If the said prior Awardee/Allocatee is unable to satisfactorily resolve the compliance issues, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the Assistance Agreement and the award made under this NOFA.

3. Default Status

If, at any time prior to entering into an Assistance Agreement through this NOFA, the CDFI Fund has made a final determination that an Awardee is a prior Awardee/Allocatee under any CDFI Fund program is in default of a previously executed assistance, allocation, or award agreement(s), the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Assistance Agreement, until said prior Awardee/Allocatee has submitted a complete and timely report demonstrating full compliance within the CDFI Fund's timeframe. If said prior Awardee/Allocatee is unable to meet this requirement and the CDFI Fund has not specified in writing that the prior Awardee/Allocatee is otherwise eligible to receive an Award under this NOFA, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the Assistance Agreement and the award made under this NOFA.

4. Termination in Default

The CDFI Fund reserves the right, in its sole discretion, to delay entering into or not to enter into an Assistance Agreement if: (i) Within the 12-month period prior to entering into an Assistance Agreement for this funding round, the CDFI Fund has made a final determination that a prior Awardee under any CDFI Fund program whose award or allocation agreement was terminated in default, and (ii) the final reporting period end date for the applicable terminated agreement falls within the 12-month period prior to this NOFA's application deadline.

5. Compliance With Federal Anti-Discrimination Laws

If the Awardee has previously received funding through any CDFI Fund program, and if at any time prior to entering into an Assistance Agreement through this NOFA, the CDFI Fund is made aware of a final determination, made within the last three years, in any proceeding instituted against the Awardee in, by, or before any court, governmental, or administrative body or agency, declaring that the Awardee has discriminated on the basis of race, color, national origin, disability, age, marital status, receipt of income from public assistance, religion, or sex, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the Assistance Agreement and the award made under this NOFA.

B. Reporting

1. Reporting Requirements

At least on an annual basis, the CDFI Fund will collect information from each Awardee including, but not limited to, an Annual Report with the following components: (i) Financial Reports, (ii) OMB A–133 audit; (iii) A–133 Narrative Report; (iv) Institution Level Report; (v) Transaction Level Report (for Awardees receiving FA awards); (vi) Financial Status Report SF–425 (for Awardees receiving TA grants); (vii) Uses of Financial Assistance (for Awardees receiving FA awards); (viii) Uses of Technical Assistance (for Awardees receiving TA grants); (ix) Explanation of Noncompliance (as applicable); and (x) such other information as the CDFI Fund may require. Each Awardee is responsible for the timely and complete submission of the Annual Report, even if all or a portion of the documents is actually completed by another entity or signatory to the Assistance Agreement. If such other entities or signatories are required to provide Institution Level Reports, Transaction Level Reports, Financial Reports, or other documentation that the CDFI Fund may require, the Awardee is responsible for ensuring that the information submitted is timely and complete. The CDFI Fund reserves the right to contact such additional entities or signatories to the Assistance Agreement and require that additional information and documentation be provided. The CDFI Fund will use such information to monitor each Awardee's compliance with the requirements in the Assistance Agreement and to assess the impact of the CDFI Program. All reports must be electronically submitted to the CDFI Fund via the Awardee's myCDFIFund account. The Institution Level Report and the Transaction Level Report must be submitted through the CDFI Fund's Web-based data collection system, the Community Investment Impact System (CIIS). The Financial Reports may be uploaded to the Awardee's myCDFIFund account. All other components of the Annual Report may be submitted electronically, as the CDFI Fund directs. The CDFI Fund reserves the right, in its sole discretion, to modify these reporting requirements if it determines it to be appropriate and necessary; however, such reporting requirements will be modified only after notice to Awardees.

2. Accounting

The CDFI Fund will require each FA and TA Awardee to account for and track the use of its award. This means that FA and TA Awardees must track every dollar and must inform the CDFI Fund of its uses. This will require Awardees to establish separate administrative and accounting controls, subject to the applicable OMB Circulars. The CDFI Fund will provide guidance on the format and content of the annual information to be provided, outlining and describing how the funds were used. All Awardees must provide the CDFI Fund with an accurate and completed Automated Clearinghouse (ACH) form prior to award closing and disbursement.

VII. Agency Contacts

A. The CDFI Fund will respond to questions concerning this NOFA and the funding Application between the hours of 9 a.m. and 5 p.m. Eastern Time, starting on the date that the NOFA is published through three business days prior to the application deadline. During the three business days prior to the application deadline, the CDFI Fund will not respond to questions for Applicants until after the application deadline. Applications and other information regarding the CDFI Fund and its programs may be obtained from the CDFI Fund's Web site at *http://www.cdfifund.gov*. The CDFI Fund will post on its Web site responses to questions of general applicability regarding the CDFI Program.

B. Applicants may contact the CDFI Fund as follows:

TABLE 9—CONTACT INFORMATION

Type of question	Telephone number (not toll free)	Email addresses
Fax number for all offices: (202) 622–7754		
CDFI Program	(202) 622–6355	*cdfihelp@cdfi.treas.gov.*
Certification, Compliance Monitoring and Evaluation	(202) 622–6330	*ccme@cdfi.treas.gov.*
Information Technology Support	(202) 622–2455	*IThelpdesk@cdfi.treas.gov.*

C. Information Technology Support

People who have visual or mobility impairments that prevent them from creating a Target Market map using the CDFI Fund's Web site should call (202) 622–2455 for assistance (this is not a toll free number).

D. Communication With the CDFI Fund

The CDFI Fund will use the Applicants' and Awardees' contact information in their myCDFIFund accounts to communicate. It is imperative; therefore, that Applicants, Awardees, Subsidiaries, Affiliates, and signatories maintain accurate contact information in their accounts. This includes information like contact names, especially for the authorized representative; email addresses; fax and phone numbers; and office locations. For more information about myCDFIFund, as well as information on the Community Investment Impact System, please see the following Web site: *http://www.cdfifund.gov/ciis/accessingciis.pdf.*

VIII. Information Sessions and Outreach

The CDFI Fund may conduct Webinars or host information sessions for organizations that are considering applying to, or are interested in learning about, the CDFI Fund's programs. For further information, please visit the CDFI Fund's Web site at *http://www.cdfifund.gov.*

Authority: 12 U.S.C. 4701, *et seq.;* 12 CFR parts 1805 and 1815.

Dated: October 31, 2011.

Donna J. Gambrell,

Director, Community Development Financial Institutions Fund.

[FR Doc. 2011–28684 Filed 11–4–11; 8:45 am]

BILLING CODE 4810–70–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

New Markets Tax Credit Program

AGENCY: Community Development Financial Institutions Fund, U.S. Department of the Treasury

ACTION: Request for public comment.

SUMMARY: This notice invites comments from the public regarding the New Markets Tax Credit (NMTC) Program, which is jointly administered by the Community Development Financial Institutions Fund (CDFI Fund) and the Internal Revenue Service (IRS). All materials submitted will be available for public inspection and copying.

DATES: All comments and submissions must be received by February 6, 2012.

ADDRESSES: Comments may be sent by mail to: Bob Ibanez, Manager, New Markets Tax Credit Program, CDFI Fund, U.S. Department of the Treasury, 601 13th Street NW., Suite 200 South, Washington, DC 20005; by email to *cdfihelp@cdfi.treas.gov*; or by facsimile at (202) 622–7754. Please note this is not a toll-free number.

FOR FURTHER INFORMATION CONTACT: Information regarding the CDFI Fund may be found on the CDFI Fund's Web site at *http://www.cdfifund.gov.*

SUPPLEMENTARY INFORMATION: The New Markets Tax Credit Program was authorized by the Community Renewal Tax Relief Act of 2000 (Pub. L. 106–554). It has been extended and amended since initial authorization. The CDFI Fund periodically seeks the views of the public on the NMTC Program, seeking to increase its effectiveness, while reducing cost and burden on program participants. Currently the CDFI Fund is conducting through a third-party a long term, longitudinal study of the NMTC Program, including an evaluation of investor behavior. This study will be completed in 2012. Once this study is complete, the CDFI Fund may seek comments from the public about whether additional modifications to the program should be made based upon study findings.

In response to this Request for Public Comment, the CDFI Fund invites and encourages all comments and suggestions germane to the mission, purpose and implementation of the NMTC Program. The CDFI Fund is particularly interested in comments in the following areas:

1. Low-Income Communities and Areas of Higher Distress

The NMTC Program targets Low-Income Communities (LICs), including Targeted Populations, as defined in 12 U.S.C. 4702(20). To encourage investment in areas experiencing greater economic distress, the CDFI Fund also provides an opportunity for applicants to score more highly by committing to making investments in Areas of Higher Distress. The CDFI Fund welcomes comments on the definition of ''Low Income Community'' and designation as an Area of Higher Distress. Specifically:

LICs are generally defined by statute as census tracts with a poverty rate of at least 20 percent or a median family income at or below 80 percent of the area median income. The CDFI Fund has relied upon decennial census data in determining whether census tracts meet these qualifications, and deems as eligible those census tracts which meet the statutory criteria, provided that the decennial census data shows that the ''population for which poverty is determined'' is greater than zero.

(a) Should the CDFI Fund consider using different standards or methodologies for determining whether census tracts meet the statutory definition of low-income communities? For example, could using different census data or a different methodology appropriately include census tracts that are currently excluded? Conversely, could using different census data or a different methodology appropriately exclude census tracts that are currently eligible (e.g., census tracts with low populations)? Please cite specific examples of census tract types (not individual census tracts) and sources of national census tract-level data the CDFI Fund could use to both map eligibility and monitor compliance.

(b) In the allocation award process, should the CDFI Fund increase the commitment percentage from 75 percent of investments made in Areas of Higher Distress in order to receive the highest scores for this sub-section of the Community Impact score (See question 25(a) of the 2011 application)? Should the CDFI Fund include additional distress indicators, alter or eliminate any existing indicators?

2. Treatment of Certain Businesses

The NMTC Program statute (at Internal Revenue Code § 45D(d)(2)) provides the definition of a Qualified Low-Income Community Business (QALICB), including certain types of businesses that cannot qualify based upon the nature of their operations (i.e., any trade or business consisting of the operation of any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises).

(a) Are there certain other types of businesses that should be discouraged or barred from receiving NMTC investments? If so, what types of businesses, and what administrative means could be utilized to discourage such investments?

(b) Should the CDFI Fund provide additional opportunities in the allocation award process for applicants to score more highly by committing to invest in certain business types over others (e.g., small business or rural investment, operating businesses vs. real estate projects, etc.)?

(c) Are there specific administrative or regulatory changes that would facilitate the financing of specific types of businesses while preserving public policy objectives and safeguards?

3. Community Accountability

The authorizing statute (Title I, subtitle C, Section 121 of the Community Renewal Tax Relief Act of 2000 (Pub. L. 106–554), as amended) and the CDFI Fund require certain community accountability and primary mission standards be met in order for an entity to qualify as a Community Development Entity (CDE). Moreover, the CDFI Fund evaluates CDE Applicants on certain community accountability dimensions. The CDFI Fund welcomes comments on the community accountability of CDEs. Specifically:

(a) Should the CDFI Fund increase the community accountability standards for an entity to qualify as a CDE? For example, (1) increase the minimum percentage of Low-Income Community Representatives required on the board (governing or advisory) that is providing accountability for the CDE; or (2) require some minimum of Low-Income Community Representatives to be locally based, such as local residents and/or government officials?

(b) Should CDE community accountability standards differ for CDEs depending on whether they use governing or advisory boards to demonstrate accountability?

(c) Should the CDE be required to have Low-Income Community Representatives approve of investments made by the CDE?

(d) Should CDE activities be required to be coordinated with community stakeholders? If so, how should this coordination be conducted and demonstrated?

(e) Should the CDFI Fund implement measures to increase the transparency of CDE activities? For example, should it (i) require CDE board meetings to be open to the public and require advance public notice of such meetings; (ii) require CDEs to keep and publish minutes of board meetings; or (iii) require CDEs to make board member contact information readily available to the public?

(f) If a CDE has a Controlling Entity, should the CDFI Fund require that the Controlling Entity of the CDE also meets community accountability requirements? If so, what requirements should be applied?

(g) Should CDE community accountability requirements differ for allocatee CDEs and non-allocatee CDEs?

(h) Are there other ways in which CDEs can enhance their accountability to the Low-Income Communities in their respective service areas?

4. Transaction Costs

The CDFI Fund requests comments on whether additional rules, restrictions, and requirements should be imposed related to fees and expenses charged by CDEs. Specifically:

(a) Should there be greater disclosure of (and perhaps limitations on) the fees and other sources of compensation and profits that NMTC applicants propose and NMTC allocatees and their affiliates charge to (or receive from) their borrowers, investors or other parties involved in NMTC transactions? Should such information be made available by applicants and allocatees directly or through the CDFI Fund to the public or should it remain excluded from disclosure as proprietary business information?

(b) Should the CDFI Fund provide an opportunity for CDEs that commit to limit fee and other forms of compensation to earn a higher score in the allocation award process? If so, please provide specific standards that could be used.

(c) Are there specific administrative or regulatory changes that would reduce transaction costs while preserving public policy objectives and safeguards?

5. Evaluation of Financial Products

The CDFI Fund provides an opportunity in the allocation award process for applicants to earn a higher score in the Business Strategy section by committing to providing equity, equity-equivalent financing, debt with below-market interest rates, or debt with certain flexible terms (question 15 of the 2011 application). The CDFI Fund welcomes comments on the CDFI Fund's evaluation of the quality of an applicant's financial products. Specifically:

(a) Should the CDFI Fund adopt the use of a defined Effective Annual Percentage Rate for purposes of the application and compliance measurement? Should the CDFI Fund alter the flexible rates and terms question (question 15 of the 2011 application) to base the scoring preference on a basis point reduction from a market benchmark determined by the CDE (or a standard metric such as LIBOR) instead of a percentage? Should the benchmarks be raised?

(b) Are there specific administrative or regulatory changes that would facilitate the provision of specific financial products while preserving public policy objectives and safeguards?

6. Use of Other Federally Subsidized Financing in Conjunction With NMTCs

Often, CDEs and NMTC investors use other sources of federally subsidized financing (e.g., historic tax credits, Section 108 loan guarantees) to help finance NMTC transactions. These sources of financing are sometimes used in addition to the Qualified Equity Investment (QEI), as part of a leveraged debt transaction, or as simultaneous investments made at the project-level. Currently, the only restriction against commingling of federal funds is that NMTCs may not be used in conjunction with Low Income Housing Tax Credits.

(a) Should there be any additional restrictions in the allocation award process regarding the use of NMTCs with other sources of federally-subsidized financing? If so, are there certain types of federal financing that should be disallowed? Should it matter whether the financing is made as part of

the QEI investment (e.g., through the leveraged debt structure) or at the project level?

(b) Assuming that it is appropriate for any other source of federally-subsidized financing to be used in conjunction with NMTC investments, would it be prudent for the CDFI Fund to limit, as part of the allocation process, the overall amount of QEI dollars or project level investments that may be supported with other sources of federal financing?

(c) Are there specific administrative or regulatory changes that could facilitate the coordination of other federally subsidized financing in conjunction with NMTCs while preserving public policy objectives and safeguards?

Authority: 26 U.S.C. 45D; 31 U.S.C. 321; 26 CFR 1.45D–1.

Dated: November 1, 2011.

Donna J. Gambrell,

Director, Community Development Financial Institutions Fund.

[FR Doc. 2011–28687 Filed 11–4–11; 8:45 am]

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FEDERAL REGISTER

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Part II

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Part 44

Board of Governors of the Federal Reserve System

12 CFR Part 248

Federal Deposit Insurance Corporation

12 CFR Part 351

Securities and Exchange Commission

17 CFR 255

Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds; Proposed Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 44

[Docket No. OCC–2011–0014]

RIN 1557–AD44

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

12 CFR Part 248

[Docket No. R–1432]

RIN 7100 AD 82

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 351

RIN 3064–AD85

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 255

[Release No. 34–65545; File No. S7–41–11]

RIN 3235–AL07

Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds

AGENCY: Office of the Comptroller of the Currency, Treasury (''OCC''); Board of Governors of the Federal Reserve System (''Board''); Federal Deposit Insurance Corporation (''FDIC''); and Securities and Exchange Commission (''SEC'').

ACTION: Notice of proposed rulemaking.

SUMMARY: The OCC, Board, FDIC, and SEC (individually, an ''Agency,'' and collectively, ''the Agencies'') are requesting comment on a proposed rule that would implement Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') which contains certain prohibitions and restrictions on the ability of a banking entity and nonbank financial company supervised by the Board to engage in proprietary trading and have certain interests in, or relationships with, a hedge fund or private equity fund.

DATES: Comments should be received on or before January 13, 2012.

ADDRESSES: Interested parties are encouraged to submit written comments jointly to all of the Agencies. Commenters are encouraged to use the title ''Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds'' to facilitate the organization and distribution of comments among the Agencies. Commenters are also encouraged to identify the number of the specific question for comment to which they are responding.

Office of the Comptroller of the Currency: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or email, if possible. Please use the title ''Restrictions on Proprietary Trading and Certain Interests in and Relationships with Hedge Funds and Private Equity Funds'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—''Regulations.gov'':* Go to *http://www.regulations.gov.* Select ''Document Type'' of ''Proposed Rules,'' and in the ''Enter Keyword or ID Box,'' enter Docket ID ''OCC–2011–14,'' and click ''Search.'' On ''View By Relevance'' tab at the bottom of screen, in the ''Agency'' column, locate the Proposed Rule for the OCC, in the ''Action'' column, click on ''Submit a Comment'' or ''Open Docket Folder'' to submit or view public comments and to view supporting and related materials for this rulemaking action.
- Click on the ''Help'' tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- *Email: regs.comments@occ.treas.gov.*
- *Mail:* Office of the Comptroller of the Currency, 250 E Street SW., Mail Stop 2–3, Washington, DC 20219.
- *Fax:* (202) 874–5274.
- *Hand Delivery/Courier:* 250 E Street SW., Mail Stop 2–3, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''Docket ID OCC–2011–14'' in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this proposed rulemaking by any of the following methods:

- *Viewing Comments Electronically:* Go to *http://www.regulations.gov.* Select ''Document Type'' of ''Public Submissions,'' and in the ''Enter Keyword or ID Box,'' enter Docket ID ''OCC–2011–14,'' and click ''Search.'' Comments will be listed under ''View By Relevance'' tab at the bottom of screen. If comments from more than one agency are listed, the ''Agency'' column will indicate which comments were received by the OCC.
- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC, 250 E Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

Docket: You may also view or request available background documents and project summaries using the methods described above.

Board of Governors of the Federal Reserve System:

You may submit comments, identified by Docket No. R–1432 and RIN 7100 AD 82, by any of the following methods:

- *Agency Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Address to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments will be made available on the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any identifying or contact information. Public

comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets NW.,) between 9 a.m. and 5 p.m. on weekdays.

Federal Deposit Insurance Corporation: You may submit comments, identified by RIN number, by any of the following methods:

- *Agency Web site: http://www.fdic.gov/regulations/laws/federal/propose.html.* Follow instructions for submitting comments on the Agency Web site.
- *Email: Comments@fdic.gov.* Include the RIN 3064–AD85 on the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Public Inspection: All comments received must include the agency name and RIN 3064–AD85 for this rulemaking. All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html,* including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E–I002, Arlington, VA 22226 by telephone at 1 (877) 275–3342 or 1 (703) 562–2200.

Securities and Exchange Commission: You may submit comments by the following method:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–41–11 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–41–11. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: *OCC:* Deborah Katz, Assistant Director, or Ursula Pfeil, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090; Roman Goldstein, Senior Attorney, Securities and Corporate Practices Division, (202) 874–5210; Kurt Wilhelm, Director for Financial Markets Group, (202) 874–4660; Stephanie Boccio, Technical Expert for Asset Management Group, or Joel Miller, Group Leader for Asset Management Group, (202) 874–4660, Office of the Comptroller of the Currency, 250 E Street SW., Washington, DC 20219.

Board: Jeremy R. Newell, Counsel, (202) 452–3239, or Christopher M. Paridon, Counsel, Legal Division, (202) 452–3274; Sean D. Campbell, Deputy Associate Director, Division of Research and Statistics, (202) 452–3760; David Lynch, Manager, Division of Bank Supervision and Regulation, (202) 452–2081, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

FDIC: Bobby R. Bean, Acting Associate Director, Capital Markets (202) 898–6705, or Karl R. Reitz, Senior Capital Markets Specialist, (202) 898–6775, Division of Risk Management Supervision; Michael B. Phillips, Counsel, (202) 898–3581, or Gregory S. Feder, Counsel, (202) 898–8724, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429–0002.

SEC: Josephine Tao, Assistant Director, Elizabeth Sandoe, Senior Special Counsel, David Bloom, Branch Chief, Anthony Kelly, Special Counsel, Angela Moudy, Attorney Advisor, or Daniel Staroselsky, Attorney Advisor, Office of Trading Practices, Division of Trading and Markets, (202) 551–5720; David Blass, Chief Counsel, or Gregg Berman, Senior Advisor to the Director, Division of Trading and Markets; Daniel S. Kahl, Assistant Director, Tram N. Nguyen, Branch Chief, Michael J. Spratt, Senior Counsel, or Parisa Haghshenas, Law Clerk, Office of Investment Adviser Regulation, Division of Investment Management, (202) 551–6787; David Beaning, Special Counsel, Office of Structured Finance, Division of Corporation Finance, (202) 551–3850; John Harrington, Special Counsel, Office of Capital Market Trends, Division of Corporation Finance, (202) 551–3860; Richard Bookstaber, Senior Policy Advisor, or Jennifer Marietta-Westberg, Assistant Director, Office of the Sell Side; or Adam Yonce, Financial Economist, Division of Risk Strategy and Financial Innovation, (202) 551–6600, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Act was enacted on July 21, 2010.[1] Section 619 of the Dodd-Frank Act added a new section 13 to the Bank Holding Company Act of 1956 (''BHC Act'') (to be codified at 12 U.S.C. 1851) that generally prohibits any banking entity [2] from engaging in proprietary trading or from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a hedge fund or private equity fund (''covered fund''), subject to certain exemptions.[3] New section 13 of the BHC Act also provides for nonbank financial companies supervised by the Board that engage in such activities or have such interests or relationships to be subject to additional capital requirements, quantitative limits, or other restrictions.[4]

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[2] Application of the proposed rule to smaller, less-complex banking entities is discussed below in Part II.F of this Supplemental Information.

[3] The term ''banking entity'' is defined in section 13(h)(1) of the BHC Act, as amended by section 619 of the Dodd-Frank Act. *See* 12 U.S.C. 1851(h)(1). The statutory definition includes any insured depository institution (other than certain limited purpose trust institutions), any company that controls an insured depository institution, any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106), and any affiliate or subsidiary of any of the foregoing. Section 13 of the BHC Act defines the terms ''hedge fund'' and ''private equity fund'' as an issuer that would be an investment company, as defined under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), but for section 3(c)(1) or 3(c)(7) of that Act, or any such similar funds as the appropriate Federal banking agencies (i.e., the Board, OCC, and FDIC), the SEC, and the CFTC may, by rule, determine should be treated as a hedge fund or private equity fund. *See* 12 U.S.C. 1851(h)(2).

[4] *See* 12 U.S.C. 1851(a)(2) and (f)(4). A ''nonbank financial company supervised by the Board'' is a nonbank financial company or other company that the Financial Stability Oversight Council (''Council'') has determined, under section 113 of the Dodd-Frank Act, shall be subject to supervision by the Board and prudential standards. The Board is not proposing at this time any additional capital requirements, quantitative limits, or other

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A. Rulemaking Framework

Section 13 of the BHC Act requires that implementation of its provisions occur in several stages. First, the Council was required to conduct a study (''Council study'') and make recommendations by January 21, 2011 on the implementation of section 13 of the BHC Act. The Council study was issued on January 18, 2011, and included a detailed discussion of key issues related to implementation of section 13 and recommended that the Agencies consider taking a number of specified actions in issuing rules under section 13 of the BHC Act.[5] The Council study also recommended that the Agencies adopt a four-part implementation and supervisory framework for identifying and preventing prohibited proprietary trading, which included a programmatic compliance regime requirement for banking entities, analysis and reporting of quantitative metrics by banking entities, supervisory review and oversight by the Agencies, and enforcement procedures for violations.[6] The Agencies have carefully considered the Council study and its recommendations, and have consulted with staff of the Commodity Futures Trading Commission (''CFTC''), in formulating this proposal.[7]

Authority for developing and adopting regulations to implement the prohibitions and restrictions of section 13 of the BHC Act is divided between the Agencies in the manner provided in section 13(b)(2) of the BHC Act.[8] The statute also requires the Agencies, in developing and issuing implementing rules, to consult and coordinate with each other, as appropriate, for the purposes of assuring, to the extent possible, that such rules are comparable and provide for consistent application and implementation of the applicable provisions of section 13 of the BHC Act.[9] Such coordination will assist in ensuring that advantages are not unduly provided to, and that disadvantages are not unduly imposed upon, companies affected by section 13 of the BHC Act and that the safety and soundness of banking entities and nonbank financial companies supervised by the Board are protected. The statute requires the Agencies to implement rules under section 13 not later than 9 months after the Council completes its study (i.e., not later than October 18, 2011).[10] The restrictions and prohibitions of section 13 of the BHC Act become effective 12 months after issuance of final rules by the Agencies, or July 21, 2012, whichever is earlier.[11]

In addition, the statute required the Board, acting alone, to adopt rules to implement the provisions of section 13 of the BHC Act that provide a banking entity or a nonbank financial company supervised by the Board a period of time *after* the effective date of section 13 of the BHC Act to bring the activities, investments, and relationships of the banking entity into compliance with that section and the Agencies' implementing regulations.[12] The Board issued its final conformance rule as required under section 13(c)(6) of the BHC Act on February 8, 2011 (''Board's Conformance Rule'').[13] As noted in the issuing release for the Board's Conformance Rule, this period is intended to give markets and firms an opportunity to adjust to section 13 of the BHC Act.[14]

B. Section 13 of the BHC Act

Section 13 of the BHC Act generally prohibits banking entities from engaging in proprietary trading or from acquiring or retaining any ownership interest in, or sponsoring, a covered fund.[15] However, section 13(d)(1) of that Act expressly includes exemptions from these prohibitions for certain permitted activities, including:

- Trading in certain government obligations;
- Underwriting and market making-related activities;
- Risk-mitigating hedging activity;
- Trading on behalf of customers;
- Investments in Small Business Investment Companies (''SBICs'') and public interest investments;
- Trading for the general account of insurance companies;
- Organizing and offering a covered fund (including limited investments in such funds);
- Foreign trading by non-U.S. banking entities; and
- Foreign covered fund activities by non-U.S. banking entities.[16]

For purposes of this Supplementary Information, trading activities subject to section 13 of the BHC Act, including those permitted under a relevant exemption, are sometimes referred to as ''covered trading activities.'' Similarly, activities and investments with respect to a covered fund that are subject to section 13 of the BHC Act, including those permitted under a relevant exemption, are sometimes referred to as ''covered fund activities or investments.''

Additionally, section 13 of the BHC Act permits the Agencies to grant, by rule, other exemptions from the prohibitions on proprietary trading and acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund if the Agencies determine

restrictions on nonbank financial companies pursuant to section 13 of the BHC Act, as it believes doing so would be premature in light of the fact that the Council has not yet finalized the criteria for designation of, nor yet designated, any nonbank financial company.

[5] *See* Financial Stability Oversight Council, Study and Recommendations on Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds (Jan. 18, 2011), *available at http://www.treasury.gov/initiatives/Documents/Volcker%20sec%20619%20study%20final%201%2018%2011%20rg.pdf. See* 12 U.S.C. 1851(b)(1). Prior to publishing its study, the Council requested public comment on a number of issues to assist the Council in conducting its study. *See* 75 FR 61,758 (Oct. 6, 2010). Approximately 8,000 comments were received from the public, including from members of Congress, trade associations, individual banking entities, consumer groups, and individuals. As noted in the issuing release for the Council Study, these comments were carefully considered by the Council when drafting the Council study.

[6] *See* Council study at 5–6. The Agencies have implemented this recommendation through the proposed compliance program requirements contained in Subpart D of this proposal with respect to both proprietary trading and covered fund activities and investments.

[7] The Agencies also received a number of comment letters concerning implementation of section 13 of the BHC Act in advance of this proposal. The Agencies have carefully considered these comments in formulating this proposal.

[8] *See* 12 U.S.C. 1851(b)(2). Under section 13(b)(2)(B) of the BHC Act, rules implementing section 13's prohibitions and restrictions must be issued by: (i) The appropriate Federal banking agencies (i.e., the Board, the OCC, and the FDIC), jointly, with respect to insured depository institutions; (ii) the Board, with respect to any company that controls an insured depository institution, or that is treated as a bank holding company for purposes of section 8 of the International Banking Act, any nonbank financial company supervised by the Board, and any subsidiary of any of the foregoing (other than a subsidiary for which an appropriate Federal banking agency, the SEC, or the CFTC is the primary financial regulatory agency); (iii) the CFTC with respect to any entity for which it is the primary financial regulatory agency, as defined in section 2 of the Dodd-Frank Act; and (iv) the SEC with respect to any entity for which it is the primary financial regulatory agency, as defined in section 2 of the Dodd-Frank Act. *See id.*

[9] *See* 12 U.S.C. 1851(b)(2)(B)(ii). The Secretary of the Treasury, as Chairperson of the Council, is responsible for coordinating the Agencies' rulemakings under section 13 of the BHC Act. *See id.*

[10] *See id.* at 1851(b)(2)(A).

[11] *See id.* at 1851(c)(1).

[12] *See id.* at 1851(c)(6).

[13] *See Conformance Period for Entities Engaged in Prohibited Proprietary Trading or Private Equity Fund or Hedge Fund Activities,* 76 FR 8265 (Feb. 14, 2011).

[14] *See id.* (citing 156 Cong. Rec. S5898 (daily ed. July 15, 2010) (statement of Sen. Merkley)).

[15] 12 U.S.C. 1851(a)(1)(A) and (B).

[16] *See id.* at 1851(d)(1). As described in greater detail in Part III.B.4 of this Supplementary Information, the proposed rule applies some of these statutory exemptions only to the proprietary trading prohibition or the covered fund prohibitions and restrictions, but not both, where it appears either by plain language or by implication that the exemption was intended only to apply to one or the other.

that the exemption would promote and protect the safety and soundness of the banking entity and the financial stability of the United States.[17] Furthermore, under the statute, no banking entity may engage in a permitted activity if that activity would (i) involve or result in a material conflict of interest or material exposure of the banking entity to high-risk assets or high-risk trading strategies, or (ii) pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.[18]

Section 13(f) of the BHC Act separately prohibits a banking entity that serves, directly or indirectly, as the investment manager, investment adviser, or sponsor to a covered fund, and any affiliate of such a banking entity, from entering into any transaction with the fund, or any other covered fund controlled by such fund, that would be a ''covered transaction'' as defined in section 23A of the Federal Reserve Act (''FR Act''),[19] as if such banking entity or affiliate were a member bank and the covered fund were an affiliate thereof, subject to certain exceptions.[20] Section 13(f) also provides that a banking entity may enter into certain prime brokerage transactions with any covered fund in which a covered fund managed, sponsored, or advised by the banking entity has taken an equity, partnership, or other ownership interest, but any such transaction (and any other permitted transaction with such funds) must be on market terms in accordance with the provisions of section 23B of the FR Act.[21]

Section 13 of the BHC Act does not prohibit a nonbank financial company supervised by the Board from engaging in proprietary trading, or from having the types of ownership interests in or relationships with a covered fund that a banking entity is prohibited or restricted from having under section 13 of the BHC Act. However, section 13 of the BHC Act provides for the Board or other appropriate Agency to impose additional capital charges, quantitative limits, or other restrictions on a nonbank financial company supervised by the Board or their subsidiaries and affiliates that are engaged in such activities or maintain such relationships.[22]

[17] *Id.* at 1851(d)(1)(J).

[18] *See id.* at 1851(d)(2).

[19] *See* 12 U.S.C. 371c.

[20] 12 U.S.C. 1851(f).

[21] 12 U.S.C. 371c–1.

[22] *See* 12 U.S.C. 1851(a)(2), (d)(4).

II. Overview of Proposed Rule

A. General Approach

In formulating the proposed rule, the Agencies have attempted to reflect the structure of section 13 of the BHC Act, which is to prohibit a banking entity from engaging in proprietary trading or acquiring or retaining an ownership interest in, or having certain relationships with, a covered fund, while permitting such entities to continue to provide client-oriented financial services. However, the delineation of what constitutes a prohibited or permitted activity under section 13 of the BHC Act often involves subtle distinctions that are difficult both to describe comprehensively within regulation and to evaluate in practice. The Agencies appreciate that while it is crucial that rules under section 13 of the BHC Act clearly define and implement its requirements, any rule must also preserve the ability of a banking entity to continue to structure its businesses and manage its risks in a safe and sound manner, as well as to effectively deliver to its clients the types of financial services that section 13 expressly protects and permits. These client-oriented financial services, which include underwriting, market making, and traditional asset management services, are important to the U.S. financial markets and the participants in those markets, and the Agencies have endeavored to develop a proposed rule that does not unduly constrain banking entities in their efforts to safely provide such services. At the same time, providing appropriate latitude to banking entities to provide such client-oriented services need not and should not conflict with clear, robust, and effective implementation of the statute's prohibitions and restrictions. Given these complexities, the Agencies request comment on the potential impacts the proposed approach may have on banking entities and the businesses in which they engage. In particular, and as discussed further in Part VII of this Supplemental Information, the Agencies recognize that there are economic impacts that may arise from the proposed rule and its implementation of section 13 of the BHC Act, and the Agencies request comment on such impacts, including quantitative data, where possible.

In light of these larger challenges and goals, the Agencies' proposal takes a multi-faceted approach to implementing section 13 of the BHC Act. In particular, the proposed rule includes a framework that: (i) Clearly describes the key characteristics of both prohibited and permitted activities; (ii) requires banking entities to establish a comprehensive programmatic compliance regime designed to ensure compliance with the requirements of the statute and rule in a way that takes into account and reflects the unique nature of a banking entity's businesses; and (iii) with respect to proprietary trading, requires certain banking entities to calculate and report meaningful quantitative data that will assist both banking entities and the Agencies in identifying particular activity that warrants additional scrutiny to distinguish prohibited proprietary trading from otherwise permissible activities. This multi-faceted approach, which is consistent with the implementation and supervisory framework recommended in the Council study, is intended to strike an appropriate balance between accommodating prudent risk management and the continued provision of client-oriented financial services by banking entities while ensuring that such entities do not engage in prohibited proprietary trading or restricted covered fund activities or investments.[23]

In addition, and consistent with the statutory requirement that the Agencies' rules under section 13 of the BHC Act be, to the extent possible, comparable and provide for consistent application and implementation, the Agencies have proposed a common rule and appendices. This uniform approach to implementation is intended to provide the maximum degree of clarity to banking entities and market participants and ensure that section 13's prohibitions and restrictions are applied consistently across different types of regulated entities.[24]

As a matter of structure, the proposed rule is generally divided into four subparts and contains three appendices, as follows:

- Subpart A of the proposed rule describes the authority, scope, purpose, and relationship to other authorities of the rule and defines terms used commonly throughout the rule;
- Subpart B of the proposed rule prohibits proprietary trading, defines terms relevant to covered trading activity, establishes exemptions from

[23] In recognition of economic impacts that may arise from the proposed rule and its implementation of section 13 of the BHC Act, the Agencies are requesting comment on the relative costs and benefits of the proposal in Part VII of this Supplemental Information.

[24] Under this uniform approach, each Agency is proposing the same rule provisions under section 13 of the BHC Act. Each Agency's proposed rule would apply only to banking entities for which the Agency has regulatory authority under section 13(b)(2)(B) of the BHC Act.

the prohibition on proprietary trading and limitations on those exemptions, and requires certain banking entities to report quantitative measurements with respect to their trading activities;

- Subpart C of the proposed rule prohibits or restricts acquiring or retaining an ownership interest in, and certain relationships with, a covered fund, defines terms relevant to covered fund activities and investments, as well as establishes exemptions from the restrictions on covered fund activities and investments and limitations on those exemptions;
- Subpart D of the proposed rule generally requires banking entities to establish an enhanced compliance program regarding compliance with section 13 of the BHC Act and the proposed rule, including written policies and procedures, internal controls, a management framework, independent testing of the compliance program, training, and recordkeeping;
- Appendix A of the proposed rule details the quantitative measurements that certain banking entities may be required to compute and report with respect to their trading activities; [25]
- Appendix B of the proposed rule provides commentary regarding the factors the Agencies propose to use to help distinguish permitted market making-related activities from prohibited proprietary trading; and
- Appendix C of the proposed rule details the minimum requirements and standards that certain banking entities must meet with respect to their compliance program, as required under subpart D.[26]

In addition, the Board's proposed rule also contains a subpart E, to which the provisions of the Board's Conformance Rule under section 13 of the BHC Act will be recodified from their current location in the Board's Regulation Y.

B. Proprietary Trading Restrictions

Subpart B of the proposed rule implements the statutory prohibition on proprietary trading and the various exemptions to this prohibition included in the statute. Section __.3 of the proposed rule contains the core prohibition on proprietary trading and defines a number of related terms, including ''proprietary trading'' and ''trading account.'' The proposed rule's definition of proprietary trading generally parallels the statutory definition, and includes engaging as principal for the trading account of a banking entity in any transaction to purchase or sell certain types of financial positions.[27]

The proposed rule's definition of trading account generally parallels the statutory definition, and provides further guidance regarding the circumstances in which a position will be considered to have been taken principally for the purpose of short-term resale or benefiting from actual or expected short-term price movements, recognizing the importance of providing as much clarity as possible regarding this term, which ultimately defines the scope of accounts subject to the prohibition on proprietary trading.[28] In particular, the proposed definition of trading account identifies three classes of positions that would cause an account to be a trading account. First, the definition includes positions taken principally for the purpose of short-term resale, benefitting from short-term price movements, realizing short-term arbitrage profits, or hedging another trading account position.[29] As described in this notice, this language is substantially similar to language for a ''trading position'' used in the Federal banking agencies' current market risk capital rules, as proposed to be revised (''Market Risk Capital Rules''),[30] and the Agencies propose to interpret this language in a similar manner. Second, with respect to a banking entity subject to the Federal banking agencies' Market Risk Capital Rules, the definition includes all positions in financial instruments subject to the prohibition on proprietary trading that are treated as ''covered positions'' under those capital rules, other than certain foreign exchange and commodities positions. Third, the definition includes all positions acquired or taken by certain registered securities and derivatives dealers (or, in the case of financial institutions [31] that are government securities dealers, that have filed notice with an appropriate regulatory agency) in connection with their activities that require such registration or notice.[32] The definition of trading account also contains clarifying exclusions for certain positions that do not appear to involve the requisite short-term trading intent, such as positions arising under certain repurchase and reverse repurchase arrangements or securities lending transactions, positions acquired or taken for *bona fide* liquidity management purposes, and certain positions of derivatives clearing organizations or clearing agencies.[33]

Section __.3 of the proposed rule also defines a number of other relevant terms, including the term ''covered financial position.'' This term is used to define the scope of financial instruments subject to the prohibition on proprietary trading. Consistent with the statutory language, such covered financial positions include positions (including long, short, synthetic and other positions) in securities, derivatives, commodity futures, and options on such instruments, but do not include positions in loans, spot foreign exchange or spot commodities.[34]

Section __.4 of the proposed rule implements the statutory exemptions for underwriting and market making-related activities. For each of these permitted activities, the proposed rule provides a number of requirements that must be met in order for a banking entity to rely on the applicable exemption. These requirements are generally designed to ensure that the activities, revenues and other characteristics of the banking entity's trading activity are consistent with underwriting and market making-related activities, respectively, and not prohibited proprietary trading.[35] These requirements are intended to support and augment other parts of the proposed rule's approach to implementing the prohibition on proprietary trading, including the compliance program

[25] A banking entity must comply with proposed Appendix A's reporting and recordkeeping requirements only if it has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion.

[26] In particular, a banking entity must comply with the minimum standards specified in Appendix C of the proposed rule (i) with respect to its covered trading activities, if it engages in any covered trading activities and has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters, (X) is equal to or greater than $1 billion or (Y) equals 10 percent or more of its total assets; and (ii) with respect to its covered fund activities and investments, if it engages in any covered fund activities and investments and either (X) has, together with its affiliates and subsidiaries, aggregate investments in covered funds the average value of which is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion or (Y) sponsors and advises, together with its affiliates and subsidiaries, covered funds the average total assets of which are, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion.

[27] *See* proposed rule § __.3(b)(1).

[28] *See* proposed rule § __.3(b)(2).

[29] *See* proposed rule § __.3(b)(2)(i)(A).

[30] *See* 76 FR 1890 (Jan. 11, 2011).

[31] In the context of regulation of government securities dealers under the Securities Exchange Act of 1934 (''Exchange Act''), the term ''financial institution'' as defined in section 3(a)(46) of the Exchange Act includes a bank (as defined in section 3(a)(36) of the Exchange Act) and a foreign bank (as defined in the International Banking Act of 1978). *See* 15 U.S.C. 78c(a)(46).

[32] *See* proposed rule § __.3(b)(2)(i)(B).

[33] *See* proposed rule § __.3(b)(2)(iii).

[34] *See* proposed rule § __.3(b)(3).

[35] *See* proposed rule § __.4(a), (b).

requirement and the reporting of quantitative measurements, in order to assist banking entities and the Agencies in identifying prohibited trading activities that may be conducted in the context of, or mischaracterized as, permitted underwriting or market making-related activities.

Section __.5 of the proposed rule implements the statutory exemption for risk-mitigating hedging. As with the underwriting and market-making exemptions, proposed § __.5 contains a number of requirements that must be met in order for a banking entity to rely on the exemption. These requirements are generally designed to ensure that the banking entity's trading activity is truly risk-mitigating hedging in purpose and effect.[36] Proposed § __.5 also requires banking entities to document, at the time the transaction is executed, the hedging rationale for certain transactions that present heightened compliance risks.[37] As with the exemptions for underwriting and market making-related activity, these requirements form part of a broader implementation approach that also includes the compliance program requirement and the reporting of quantitative measurements.

Section __.6 of the proposed rule implements statutory exemptions for trading in certain government obligations, trading on behalf of customers, trading by a regulated insurance company, and trading by certain foreign banking entities outside the United States. Section __.6(a) of the proposed rule describes the government obligations in which a banking entity may trade notwithstanding the prohibition on proprietary trading, which include U.S. government and agency obligations, obligations and other instruments of certain government sponsored entities, and State and municipal obligations.[38] Section __.6(b) of the proposed rule describes permitted trading on behalf of customers and identifies three categories of transactions that would qualify for the exemption.[39] These categories include: (i) Transactions conducted by a banking entity as investment adviser, commodity trading advisor, trustee, or in a similar fiduciary capacity for the account of a customer where the customer, and not the banking entity, has beneficial ownership of the related positions; (ii) riskless principal transactions; and (iii) transactions conducted by a banking entity that is a regulated insurance company for the separate account of insurance policyholders, subject to certain conditions. Section __.6(c) of the proposed rule describes permitted trading by a regulated insurance company for its general account, and generally parallels the statutory language governing this exemption.[40] Finally, § __.6(d) of the proposed rule describes permitted trading outside of the United States by a foreign banking entity.[41] The proposed exemption clarifies when a foreign banking entity will be considered to engage in such trading pursuant to sections 4(c)(9) or 4(c)(13) of the BHC Act, as required by the statute, including with respect to a foreign banking entity not currently subject to section 4 of the BHC Act. The exemption also clarifies when trading will be considered to have occurred solely outside of the United States, as required by the statute, and provides a number of specific criteria for determining whether that standard is met.

Section __.7 of the proposed rule requires certain banking entities with significant covered trading activities to comply with the reporting and recordkeeping requirements specified in Appendix A of the proposed rule. In addition, § __.7 requires that a banking entity comply with the recordkeeping requirements in § __.20 of the proposed rule, including, where applicable, the recordkeeping requirements in Appendix C of the proposed rule. Section __.7 of the proposed rule also requires a banking entity to comply with any other reporting or recordkeeping requirements that an Agency may impose to evaluate the banking entity's compliance with the proposed rule.[42] Proposed Appendix A requires those banking entities with significant covered trading activities to furnish periodic reports to the relevant Agency regarding a variety of quantitative measurements of its covered trading activities and maintain records documenting the preparation and content of these reports. These proposed reporting and recordkeeping requirements vary depending on the scope and size of covered trading activities, and a banking entity must comply with proposed Appendix A's reporting and recordkeeping requirements only if it has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion. These thresholds are designed to reduce the burden on smaller, less complex banking entities, which generally engage in limited market-making and other trading activities. Other provisions of the proposal, and in particular the compliance program requirement in § __.20 of the proposed rule, are likely to be less burdensome and equally effective methods for ensuring compliance with section 13 of the BHC Act by smaller, less complex banking entities.

The quantitative measurements that must be furnished under the proposed rule are generally designed to reflect, and provide meaningful information regarding, certain characteristics of trading activities that appear to be particularly useful to help differentiate permitted market making-related activities from prohibited proprietary trading and to identify whether certain trading activities result in a material exposure to high-risk assets or high-risk trading strategies. In addition, proposed Appendix B contains a detailed commentary regarding identification of permitted market making-related activities and distinguishing such activities from trading activities that constitute prohibited proprietary trading.

As described in Part II.B.5 of the Supplementary Information below, the Agencies expect to utilize the conformance period provided in section 13(c)(2) of the BHC Act to further refine and finalize the reporting requirements, reflecting the substantial public comment, practical experience, and revision that will likely be required to ensure appropriate, effective use of reported quantitative data in practice.

Section __.8 of the proposed rule prohibits a banking entity from relying on any exemption to the prohibition on proprietary trading if the permitted activity would involve or result in a material conflict of interest, result in a material exposure to high-risk assets or high-risk trading strategies, or pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.[43] This section also defines material conflict of interest, high-risk asset, and high-risk trading strategy for these purposes.

C. Covered Fund Activities and Investments

Subpart C of the proposed rule implements the statutory prohibition on, as principal, directly or indirectly, acquiring and retaining an ownership

[36] *See* proposed rule §§ __.5(b)(1), (2).

[37] *See* proposed rule § __.5(b)(3).

[38] *See* proposed rule § __.6(a).

[39] *See* proposed rule § __.6(b).

[40] *See* proposed rule § __.6(c).

[41] *See* proposed rule § __.6(d).

[42] *See* proposed rule § __.7.

[43] *See* proposed rule § __.8.

interest in, or having certain relationships with, a covered fund, as well as the various exemptions to this prohibition included in the statute. Section __.10 of the proposed rule contains the core prohibition on covered fund activities and investments and defines a number of related terms, including ''covered fund'' and ''ownership interest.'' The proposed rule's definition of covered fund generally parallels the statutory definition of ''hedge fund'' and ''private equity fund,'' and explains the universe of entities that would be considered a ''covered fund'' (including those entities determined by the Agencies to be ''such similar funds'') and, thus, subject to the general prohibition.[44]

The definition of ''ownership interest'' provides further guidance regarding the types of interests that would be considered to be an ownership interest in a covered fund.[45] As described in this Supplementary Information, these interests may take various forms. The definition of ownership interest also explicitly *excludes* from the definition ''carried interest'' whereby a banking entity may share in the profits of the covered fund solely as performance compensation for services provided to the covered fund by the banking entity (or an affiliate, subsidiary, or employee thereof).[46]

Section __.10 of the proposed rule also defines a number of other relevant terms, including the terms ''prime brokerage transaction,'' ''sponsor,'' and ''trustee.''

Section __.11 of the proposed rule implements the exemption for organizing and offering a covered fund provided for under section 13(d)(1)(G) of the BHC Act. Section __.11(a) of the proposed rule outlines the conditions that must be met in order for a banking entity to organize and offer a covered fund under this authority. These requirements are contained in the statute and are intended to allow a banking entity to engage in certain traditional asset management and advisory businesses in compliance with section 13 of the BHC Act.[47] The requirements are discussed in detail in Part III.C.2 of this Supplementary Information.

Section __.12 of the proposed rule permits a banking entity to acquire and retain, as an investment in a covered fund, an ownership interest in a covered fund that the banking entity organizes and offers under § __.11.[48] This section implements section 13(d)(4) of the BHC Act and related provisions. Section 13(d)(4) of the BHC Act permits a banking entity to make an investment in a covered fund that the banking entity organizes and offers pursuant to section 13(d)(1)(G), or for which it acts as sponsor, for the purposes of (i) establishing the covered fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, or (ii) making a *de minimis* investment in the covered fund in compliance with applicable requirements. Section __.12 of the proposed rule implements this authority and related limitations, including limitations regarding the amount and value of any individual per-fund investment and the aggregate value of all such permitted investments.[49] Proposed § __.12 also clarifies how a banking entity must calculate its compliance with these investment limitations (including by deducting such investments from applicable capital, as relevant), as well as sets forth how a banking entity may request an extension of the period of time within which it must conform an investment in a single covered fund.[50]

Section __.13 of the proposed rule implements the statutory exemptions described in sections 13(d)(1)(C), (E), and (I) of the BHC Act that permit a banking entity: (i) To acquire and retain an ownership interest in, or act as sponsor to, one or more SBICs, a public welfare investment, or certain qualified rehabilitation expenditures; (ii) to acquire and retain an ownership interest in a covered fund as a risk-mitigating hedging activity; and (iii) in the case of a non-U.S. banking entity, to acquire and retain an ownership interest in, or act as sponsor to, a foreign covered fund.[51] Section __.13(a) of the proposed rule permits a banking entity to acquire and retain an ownership interest in, or act as sponsor to, an SBIC or certain public interest investments, without limitation as to the amount of ownership interests it may own, hold, or control with the power to vote.[52]

Section __.13(b) of the proposed rule permits a banking entity to use an ownership interest in a covered fund to hedge, but only with respect to individual or aggregated obligations or liabilities of a banking entity that arise from: (i) The banking entity acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the customer's exposure to the profits and losses of the covered fund (similar to acting as a ''riskless principal''); or (ii) a compensation arrangement with an employee of the banking entity that directly provides investment advisory or other services to that fund.[53] Additionally, § __.13(b) of the proposed rule requires that the hedge represent a substantially similar offsetting exposure to the same covered fund and in the same amount of ownership interest in the covered fund arising out of the transaction that the acquisition or retention of an ownership interest in the covered fund is intended to hedge or otherwise mitigate.[54] Proposed § __.13(b) also requires a banking entity to document, at the time the transaction is executed, the hedging rationale for all hedging transactions involving an ownership interest in a covered fund.[55]

Section __.13(c) of the proposed rule implements section 13(d)(1)(I) of the BHC Act and permits certain foreign banking entities to acquire or retain an ownership interest in, or to act as sponsor to, a covered fund so long as such activity occurs solely outside of the United States and the entity meets the requirements of sections 4(c)(9) or 4(c)(13) of the BHC Act. This statutory exemption limits the extraterritorial application of the statutory restrictions on covered fund activities and investments to foreign firms that, in the course of operating outside of the United States, engage in activities permitted under relevant foreign law outside of the United States, while preserving national treatment and competitive equality among U.S. and foreign firms within the United States.[56] The proposed rule defines both the type of foreign banking entities that are eligible for the exemption and the circumstances in which covered fund activities or investments by such an entity will be considered to have occurred solely outside of the United States (including clarifying when an ownership interest will be considered to have been offered for sale or sold to a resident of the United States). Section __.13(d) of the proposed rule also implements in part the rule of construction contained in section 13(g)(2) of the BHC Act, which permits the sale and securitization of loans.[57] Proposed § __.13(d) clarifies that a

[44] *See* proposed rule § __.10(b)(1).

[45] *See* proposed rule § __.10(b)(3).

[46] *See* proposed rule § __.10(b)(3)(ii).

[47] *See* 156 Cong. Rec. S5889 (daily ed. July 15, 2010) (statement of Sen. Hagan).

[48] *See* proposed rule § __.12.

[49] *See* proposed rule § __.12(a)(2).

[50] *See* proposed rule §§ __.12(b), (c), and (d).

[51] *See* proposed rule § __.13(a)—(c).

[52] *See* proposed rule § __.13(a).

[53] *See* proposed rule § __.13(b)(1).

[54] *See* proposed rule §§ __.13(b)(2)(ii)(C) and (D).

[55] *See* proposed rule § __.13(b)(3).

[56] *See* 156 Cong. Rec. S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley).

[57] *See* 12 U.S.C. 1851(g)(2).

banking entity may acquire and retain an ownership interest in, or act as sponsor to, a covered fund that is an issuer of asset-backed securities, the assets or holdings of which are solely comprised of: (i) Loans; (ii) contractual rights or assets directly arising from those loans supporting the asset-backed securities; and (iii) a limited amount of interest rate or foreign exchange derivatives that materially relate to such loans and that are used for hedging purposes with respect to the securitization structure.[58] The authority contained in this section of the proposed rule would therefore allow a banking entity to acquire and retain an ownership interest in a loan securitization vehicle (which would be a covered fund for purposes of section 13(h)(2) of the BHC Act and the proposed rule) that the banking entity organizes and offers, or acts as sponsor to, in excess of the three percent limits specified in section 13(d)(4) of the BHC Act and § __.12 of the proposed rule.

Section __.14 of the proposed rule implements section 13(d)(1)(J) of the BHC Act[59] and permits a banking entity to engage in any covered fund activity or investment that the Agencies determine promotes and protects the safety and soundness of banking entities and the financial stability of the United States.[60] The Agencies have proposed to permit three activities at this time under this authority. These activities involve acquiring and retaining an ownership interest in, or acting as sponsor to, certain bank owned life insurance (''BOLI'') separate accounts, investments in and sponsoring of certain asset-backed securitizations, and investments in and sponsoring of certain entities that rely on the exclusion from the definition of investment company in section 3(c)(1) and/or 3(c)(7) of the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (''Investment Company Act'') but that are, in fact, common corporate organizational vehicles.[61] Additionally, the Agencies have proposed to permit a banking entity to acquire and retain an ownership interest in, or act as sponsor to, a covered fund, if such acquisition or retention is done (i) in the ordinary course of collecting a debt previously contracted, or (ii) pursuant to and in compliance with the conformance or extended transition periods implemented under section 13(c)(6) of the BHC Act.[62]

Section __.15 of the proposed rule, which implements section 13(e)(1) of the BHC Act,[63] requires a banking entity engaged in covered fund activities and investments to comply with (i) the internal controls, reporting, and recordkeeping requirements required under § __.20 and Appendix C of the proposed rule, as applicable and (ii) such other reporting and recordkeeping requirements as the relevant supervisory Agency may deem necessary to appropriately evaluate the banking entity's compliance with subpart C.[64]

Section __.16 of the proposed rule implements section 13(f) of the BHC Act and generally prohibits a banking entity from entering into certain transactions with a covered fund that would be a covered transaction as defined in section 23A of the FR Act.[65] Section __.16(a)(2) of the proposed rule clarifies that, for reasons explained in part III.C.7 of this Supplementary Information, certain transactions between a banking entity and a covered fund remain permissible. Section __.16(b) of the proposed rule implements the statute's requirement that any transaction permitted under section 13(f) of the BHC Act (including a prime brokerage transaction) between the banking entity and a covered fund is subject to section 23B of the FR Act,[66] which, in general, requires that the transaction be on market terms or on terms at least as favorable to the banking entity as a comparable transaction by the banking entity with an unaffiliated third party.

Section __.17 of the proposed rule prohibits a banking entity from relying on any exemption to the prohibition on acquiring and retaining an ownership interest in, acting as sponsor to, or having certain relationships with, a covered fund, if the permitted activity or investment would involve or result in a material conflict of interest, result in a material exposure to high-risk assets or high-risk trading strategies, or pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.[67] This section also defines material conflict of interest, high-risk asset, and high-risk trading strategy for these purposes.

D. Compliance Program Requirement

Subpart D of the proposed rule requires a banking entity engaged in covered trading activities or covered fund activities to develop and implement a program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on covered trading activities and covered fund activities and investments set forth in section 13 of the BHC Act and the proposed rule.[68] Section __.20(b) of the proposed rule specifies six elements that each compliance program established under subpart D must, at a minimum, include:

- Internal written policies and procedures reasonably designed to document, describe, and monitor the covered trading activities and covered fund activities and investments of the banking entity to ensure that such activities comply with section 13 of the BHC Act and the proposed rule;
- A system of internal controls reasonably designed to monitor and identify potential areas of noncompliance with section 13 of the BHC Act and the proposed rule in the banking entity's covered trading and covered fund activities and to prevent the occurrence of activities that are prohibited by section 13 of the BHC Act and the proposed rule;
- A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and the proposed rule;
- Independent testing for the effectiveness of the compliance program, conducted by qualified banking entity personnel or a qualified outside party;
- Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and
- Making and keeping records sufficient to demonstrate compliance with section 13 of the BHC Act and the proposed rule, which a banking entity must promptly provide to the relevant Agency upon request and retain for a period of no less than 5 years.

[58] *See* proposed rule § __.13(d).

[59] Section 13(d)(1)(J) of the BHC Act provides the Agencies discretion to determine that activities not specifically identified by sections 13(d)(1)(A)–(I) of the BHC Act are also exempted from the general prohibitions contained in section 13(a) of that Act, and are thus permitted activities. In order to make such a determination, the Agencies must find that such activity or activities promote and protect the safety and soundness of banking entities, as well as promote and protect the financial stability of the United States. *See* 12 U.S.C. 1851(d)(1)(J).

[60] *See* 12 U.S.C. 1851(d)(1)(J).

[61] *See* proposed rule § __.13(a)(1)–(2).

[62] *See* proposed rule at § __.14(b).

[63] Section 13(e)(1) of the BHC Act requires the Agencies to issue regulations regarding internal controls and recordkeeping to ensure compliance with section 13. *See* 12 U.S.C. 1851(e)(1).

[64] *See* proposed rule § __.15.

[65] *See* proposed rule § __.16.

[66] 12 U.S.C. 371c–1.

[67] *See* proposed rule § __.17.

[68] *See* proposed rule § __.20. If a banking entity does not engage in covered trading activities and/or covered fund activities and investments, it need only ensure that its existing compliance policies and procedures include measures that are designed to prevent the banking entity from becoming engaged in such activities and making such investments, and which require the banking entity to develop and provide for the required compliance program prior to engaging in such activities or making such investments.

For a banking entity with significant covered trading activities or covered fund activities and investments, the compliance program must also meet a number of minimum standards that are specified in Appendix C of the proposed rule.[69] The application of detailed minimum standards for these types of banking entities is intended to reflect the heightened compliance risks of large covered trading activities and covered fund activities and investments and to provide clear, specific guidance to such banking entities regarding the compliance measures that would be required for purposes of the proposed rule. For banking entities with smaller, less complex covered trading activities and covered fund activities and investments, these detailed minimum standards are not applicable, though the Agencies expect that such smaller entities will consider these minimum standards as guidance in designing an appropriate compliance program.

E. Conformance Provisions

Subpart E of the Board's proposed rule incorporates, with minor technical and conforming edits, the final rule which the Board, after soliciting and considering public comment, issued regarding the conformance periods for entities engaged in prohibited proprietary trading or covered fund activities and investments.[70] That rule implements the conformance period and extended transition period, as applicable, during which a banking entity and nonbank financial company supervised by the Board must bring its activities, investments and relationships into compliance with the prohibitions and restrictions on proprietary trading and acquiring an ownership interest in, or having certain relationships with, a covered fund.

F. Treatment of Smaller, Less-Complex Banking Entities

In formulating the proposed rule, the Agencies have carefully considered and taken into account the potential impact of the proposed rule on small banking entities and banking entities that engage in little or no covered trading activities or covered fund activities and investments, including the burden and cost that might be associated with such banking entities' compliance with the proposed rule. In particular, the Agencies have proposed to reduce the effect of the proposed rule on such banking entities by limiting the application of certain requirements, such as the reporting and recordkeeping requirements of § __.7 and Appendix A of the proposed rule and the compliance program requirements contained in subpart D and Appendix C of the proposed rule, to those banking entities that engage in little or no covered trading activities or covered fund activities and investments. The Agencies have also requested comment (i) throughout this Supplementary Information on a number of questions related to the costs and burdens associated with particular aspects of the proposal, as well as (ii) in Part VII.B of this Supplementary Information on any significant alternatives that would minimize the impact of the proposal on small banking entities.

G. Application of Section 13 of the BHC Act to Securitization Vehicles or Issuers of Asset-Backed Securities

Many issuers of asset-backed securities may be included within the definition of covered fund since they would be an investment company but for the exclusions contained in section 3(c)(1) or 3(c)(7) of the Investment Company Act.[71] If an issuer of asset-backed securities is considered to be a covered fund, then a banking entity would not be permitted to acquire or retain any ownership interest issued by such issuer except as otherwise permitted under section 13 of the BHC Act and the proposed rule.[72] Separately, issuers of asset-backed securities may be included within the definition of banking entity, as noted in Part III.A.2 of this Supplementary Information. Although the proposed definition of banking entity would not include any entity that is a covered fund, an issuer of asset-backed securities that is both (i) an affiliate or subsidiary of a banking entity,[73] and (ii) does not rely on an exclusion contained in section 3(c)(1) of 3(c)(7) of the Investment Company Act, would be a banking entity and thus subject to the requirements of section 13 of the BHC Act and the proposed rule, including: (i) The prohibition on proprietary trading; (ii) limitations on investments in and relationships with a covered fund; (iii) the establishment and implementation of a compliance program as required under the proposed rule; and (iv) recordkeeping and reporting requirements. Given the breadth of the definition of ''affiliate,'' these requirements may apply to a significant portion of the outstanding securitization market, including issuers of asset-backed securities that rely on rule 3a–7 or section 3(c)(5) of the Investment Company Act.

In recognition of these concerns, the Agencies have requested comment throughout this Supplementary Information on the potential effects of section 13 of the BHC Act and the proposed rule on the securitization industry and issuers of asset-backed securities.

[69] A banking entity must comply with the minimum standards specified in Appendix C of the proposed rule (i) with respect to its covered trading activities, if it engages in any covered trading activities and has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters, (X) is equal to or greater than $1 billion or (Y) equals 10 percent or more of its total assets; and (ii) with respect to its covered fund activities and investment, if it engages in any covered fund activities and investments and either (X) has, together with its affiliates and subsidiaries, aggregate investments in covered funds the average value of which is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion or (Y) sponsors and advises, together with its affiliates and subsidiaries, covered funds the average total assets of which are, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion.

[70] *See* 76 FR 8265 (Feb. 14, 2011).

[71] For purposes of the proposed rule, any securitization entity that meets the requirements for an exclusion under Rule 3a–7 or section 3(c)(5) of the Investment Company Act, or any other exclusion or exemption from the definition of ''investment company'' under the Investment Company Act (other than sections 3(c)(1) or 3(c)(7) of the Investment Company Act), would not be a covered fund under the proposed definition. Additionally, an issuer of asset-backed securities that is subject to legal documents mandating compliance with the conditions of section 3(c)(1) of 3(c)(7) of the Investment Company Act would not be a covered fund if such issuer also can satisfy all the conditions of an alternative exclusion or exemption for which it is eligible.

[72] For example, under the proposed rule, a banking entity would be able to acquire or retain an interest or security of an issuer of asset-backed securities that is a covered fund if: (i) The interest or security of the issuer does not qualify as an ''ownership interest'' under § __.10(b)(3) of the proposed rule; (ii) the issuer of asset-backed securities is comprised solely of loans, contractual rights or assets directly arising from those loans, and certain specified interest rate or foreign exchange derivatives used for hedging purposes, as permitted under § __.13(d) or __.14(a)(2)(v) of the proposed rule; (iii) the banking entity is a ''securitizer'' or ''originator'' and acquires and retains such interest in compliance with the minimum requirements of section 15G of the Exchange Act and any implementing regulations issued thereunder, as provided under § __.14(a)(2)(iii) of the proposed rule; or (v) the banking entity organizes and offers the issuer and the ownership interest is a permitted investment under § __.12 of the proposed rule. The circumstances where a banking entity may acquire or retain an ownership interest in a covered fund are discussed in detail in Part III.C of this Supplemental Information.

[73] The definitions of ''affiliate'' and ''subsidiary'' are discussed in detail in Part III.A.2 of this Supplemental Information.

III. Section by Section Summary of Proposed Rule

A. Subpart A—Authority and Definitions

1. Section __.1: Authority, Purpose, Scope, and Relationship to Other Authorities

a. Authority and Scope

Section __.1 of the proposed rule describes the authority under which each Agency is issuing the proposed rule, the purpose of the proposed rule, and the banking entities to which each Agency's rule applies. In addition, § __.1(d) of the proposed rule implements section 13(g)(1) of the BHC Act, which provides that the prohibitions and restrictions of section 13 apply to the activities of a banking entity regardless of whether such activities are authorized for a banking entity under other applicable provisions of law.[74]

b. Effective Date

Section 13(c)(1) of the BHC Act provides that section 13 shall take effect on the earlier of (i) 12 months after the date of issuance of final rules implementing that section, or (ii) 2 years after the date of enactment of section 13, which is July 21, 2012.[75] Because the Agencies did not issue final rules implementing section 13 of the BHC Act by July 21, 2011, § __.1 of the proposed rule specifies that the effective date for its provisions will be July 21, 2012.

The Agencies note that the proposed effective date will impact not only the date on which the proposed rule's prohibitions and restrictions on proprietary trading and covered fund activities and investments go into effect (subject to the conformance period or extended transition period provided by section 13(c) of the BHC Act),[76] but also the date on which a banking entity must comply with (i) the reporting and recordkeeping requirements of § __.7 and Appendix A of the proposed rule and (ii) the compliance program mandate of § __.20 and Appendix C of the proposed rule. As proposed, § __.1 would require a banking entity subject to either the reporting and recordkeeping or compliance program requirements to begin complying with these requirements as of July 21, 2012.[77] With respect to the compliance program requirement of the proposed rule, § __.1 would require a banking entity to have developed and implemented the required program by the proposed effective date, though the Agencies note that prohibited activities and investments may not be fully conformed by that date. The Agencies expect a banking entity to fully conform all investments and activities to the requirements of the proposed rule as soon as practicable within the conformance periods provided in section 13 of the BHC Act and the Board's rules thereunder, which define the conformance periods. With respect to the reporting and recordkeeping requirements of the proposed rule, § __.1 of the proposed rule would require a banking entity to begin furnishing these reports for all trading units or asset management units as of the effective date, though the quantitative measurements furnished for proprietary trading activities that are conducted in reliance on the authority provided by the conformance period would not be used to identify prohibited proprietary trading until such time as the relevant trading activities must be conformed.

The Agencies expect that a banking entity may need a period of time to prepare for effectiveness of the proposed rule and, in particular, to implement both the compliance program and the reporting and recordkeeping requirements provided under the proposed rule. Accordingly, in order to help assess the effects and impact of the proposed effective date and any alternative compliance dates, the Agencies request comment on the following questions:

Question 1. Does the proposed effective date provide banking entities with sufficient time to prepare to comply with the prohibitions and restrictions on proprietary trading and covered fund activities and investments? If not, what other period of time is needed and why?

Question 2. Does the proposed effective date provide banking entities with sufficient time to implement the proposal's compliance program requirement? If not, what are the impediments to implementing specific elements of the compliance program and what would be a more effective time period for implementing each element and why?

Question 3. Does the proposed effective date provide banking entities sufficient time to implement the proposal's reporting and recordkeeping requirements? If not, what are the impediments to implementing specific elements of the proposed reporting and recordkeeping requirements and what would be a more effective time period for implementing each element and why?

Question 4. Should the Agencies use a gradual, phased in approach to implement the statute rather than having the implementing rules become effective at one time? If so, what prohibitions and restrictions should be implemented first? Please explain.

2. Section __.2: Definitions

Section __.2 of the proposed rule defines a variety of terms used throughout the proposed rule, including ''banking entity,'' which defines the scope of entities to which the proposed rule applies. Consistent with the statutory definition of that term, § __.2(e) of the proposed rule provides that a ''banking entity'' includes: (i) Any insured depository institution; (ii) any company that controls an insured depository institution; (iii) any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and (iv) any affiliate or subsidiary of any of the foregoing.[78] In addition, in order to avoid application of section 13 of the BHC Act in a way that appears unintended by the statute and would create internal inconsistencies in the statutory scheme, the proposed rule also clarifies that the term ''banking entity'' does not include any affiliate or subsidiary of a banking entity, if that affiliate or subsidiary is (i) a covered fund, or (ii) any entity controlled by such a covered fund.[79] This clarification is proposed because the definition of ''affiliate'' and ''subsidiary'' under the BHC Act is broad, and could include a covered fund that a banking entity has permissibly sponsored or made an investment in because, for example, the banking entity acts as general partner or managing member of the covered fund as part of its permitted sponsorship activities.[80] If

[74] *See* proposed rule § __.1(d).

[75] *See* 12 U.S.C. 1851(c)(1).

[76] *See id.* at 1851(c)(2)–(6).

[77] *See* proposed rule § __.1.

[78] *See* proposed rule § __.2(e). Sections __.2(a) and (bb) of the proposed rule clarify that the terms ''affiliate'' and ''subsidiary'' have the same meaning as in sections 2(d) and (k) of the BHC Act (12 U.S.C. 1841(d) and (k)).

[79] The Agencies note that since the proposed rule implements section 13 of the BHC Act, it incorporates that Act's definition of ''affiliate'' and ''subsidiary.'' *See* proposed rule §§ __.2(a) and (bb). The terms affiliate and subsidiary are generally defined in section 2 of the BHC Act according to whether such entity controls or is controlled by another relevant entity. *See* 12 U.S.C. 1841(d), (k). The concept of control under the proposed rule, in turn, is as defined in section 2 of the BHC Act and as implemented by the Board. *See* 12 U.S.C. 1841(a)(2); 12 CFR 225.2(e).

[80] Under section 2 of the BHC Act and the Board's Regulation Y (12 CFR part 225), a banking entity acting as general partner or managing member of another company would be deemed to control that company and, as such, the company would be both

Continued

such a covered fund were considered a ''banking entity'' for purposes of the proposed rule, the fund itself would become subject to all of the restrictions and limitations of section 13 of the BHC Act and the proposed rule, which would be inconsistent with the purpose and intent of the statute. For example, such a covered fund would then generally be prohibited from investing in other covered funds, notwithstanding the fact that section 13(f)(3) of the BHC Act specifically contemplates such investments. Accordingly, the proposed rule would exclude from the definition of banking entity any fund that a banking entity may invest in or sponsor as permitted by the proposed rule.

An entity such as a mutual fund would generally not be a subsidiary or affiliate of a banking entity under this definition if the banking entity only provides advisory or administrative services to, has certain limited investments in, or organizes, sponsors, and manages a mutual fund (which includes a registered investment company) in accordance with BHC Act rules.[81]

Section __.2(j) of the proposed rule defines the term ''covered banking entity,'' which is used in each Agency's proposed rule to describe the specific types of banking entities to which that Agency's rule applies. In addition, a number of other definitions contained in § __.2 are discussed in further detail below in connection with the separate sections of the proposed rule in which they are used.

The proposed rule also defines the terms ''buy and purchase'' and ''sell and sale,'' which are used throughout the proposed rule to describe the scope of transactions that are subject to subparts B and C of the proposed rule. These definitions are substantially similar to the definitions of the same terms under the Exchange Act, except that the proposed definitions provide additional clarity regarding the types of transactions that would be considered the purchase or sale of a commodity future or derivative or ownership interest in a covered fund.[82] These definitions are purposefully broad in scope, and are intended to include a wide range of transaction types that would permit a banking entity to gain or eliminate, or increase or reduce, exposure to a covered financial position or ownership interest in a covered fund.

Request for Comment

The Agencies request comment on the proposed rule's definition of ''banking entity.'' In particular, the Agencies request comment on the following questions:

Question 5. Is the proposed rule's definition of banking entity effective? What alternative definitions might be more effective in light of the language and purpose of the statute?

Question 6. Are there any entities that should not be included within the definition of banking entity since their inclusion would not be consistent with the language or purpose of the statute or could otherwise produce unintended results? Should a registered investment company be expressly excluded from the definition of banking entity? Why or why not?

Question 7. Is the proposed rule's exclusion of a covered fund that is organized, offered and held by a banking entity from the definition of banking entity effective? Should the definition of banking entity be modified to exclude any covered fund? Why or why not?

Question 8. Banking entities commonly structure their registered investment company relationships and investments such that the registered investment company is not considered an affiliate or subsidiary of the banking entity. Should a registered investment company be expressly excluded from the definition of banking entity? Why or why not? Are there circumstances in which such companies should be treated as banking entities subject to section 13 of the BHC Act? How many such companies would be covered by the proposed definition?

Question 9. Under the proposed rule, would issuers of asset-backed securities be captured by the proposed definition of ''banking entity''? If so, are issuers of asset-backed securities within certain asset classes particularly impacted? Are particular types of securitization vehicles (trusts, LLCs, etc.) more likely than others to be included in the definition of banking entity? Should issuers of asset-backed securities be excluded from the proposed definition of ''banking entity,'' and if so, why? How would such an exclusion be consistent with the language and purpose of the statute?

Question 10. What would be the potential impact of including existing issuers of asset-backed securities[83] in the proposed definition of ''banking entity'' on existing issuers of asset-backed securities and the securitization market generally? How many existing issuers of asset-backed securities might be included in the proposed definition of ''banking entity''? Are there ways in which the proposed rule could be amended to mitigate or eliminate potential impact, if any, on existing asset-backed securities[84] without compromising the intent of the statute?

Question 11. What would be the legal and economic impact to an issuer of asset-backed securities of being considered a ''banking entity''? What additional costs would be incurred in the establishment and implementation of a compliance program related to the provisions of the proposed rule as required by § __.20 of the proposed rule (including Appendix C, where applicable)? Who would pay those additional costs?

Question 12. If the ownership requirement under the proposed rule for credit risk retention (section 15G of the Exchange Act) combined with the control inherent in the position of servicer or investment manager means that more securitization vehicles would be considered affiliates of banking entities, would fewer banking entities be willing to (i) serve as the servicer or investment manager of securitization transactions and/or (ii) serve as the originator or securitizer (as defined in section 15G of the Exchange Act) of securitization transactions? What other impact might the potential interplay between these rules have on future securitization transactions? Could there be other potential unintended consequences?

Question 13. Are the proposed rule's definitions of buy and purchase and sale and sell appropriate? If not, what alternative definitions would be more appropriate? Should any other terms be defined? If so, are there existing definitions in other rules or regulations that could be used in this context? Why would the use of such other definitions be appropriate?

B. Subpart B—Proprietary Trading Restrictions

1. Section __.3: Prohibition on Proprietary Trading

Section __.3 of the proposed rule describes the scope of the prohibition on proprietary trading and defines a

an ''affiliate'' and ''subsidiary'' of the banking entity for purposes of the BHC Act. *See* 12 U.S.C. 1841(d), (k).

[81] *See, e.g.,* 12 U.S.C. 1483(c)(6), (c)(8), and (k); 12 CFR 225.28(b)(6), 225.86(b)(3).

[82] *See* proposed rule §§ __.2(g), (v); 15 U.S.C. 78c(a)(13), (14).

[83] For purposes of this Supplemental Information, ''existing issuers of asset-backed securities'' means issuers that issued asset-backed securities prior to the effective date of the proposed rule.

[84] For purposes of this Supplemental Information, ''existing asset-backed securities'' means asset-backed securities that were issued prior to the effective date of the proposed rule.

number of terms related to proprietary trading. The Agencies note that the definition of ''proprietary trading'' in the statute and under the proposed rule is broad. This definition must be viewed in light of the exemptions described later in the proposed rule, which reflect statutory provisions permitting a number of activities.

a. Prohibition on Proprietary Trading

Section __.3(a) of the proposed rule implements section 13(a)(1)(A) of the BHC Act and prohibits a banking entity from engaging in proprietary trading unless otherwise permitted under §§ __.4 through __.6 of the proposed rule. Section __.3(b)(1) of the proposed rule defines proprietary trading in accordance with section 13(h)(4) of the BHC Act.[85] This definition is a key element of the proposal because, unless an activity covered by the definition is specifically permitted under one of the exemptions contained in §§ __.4 through __.6 of the proposed rule, a banking entity is prohibited from engaging in that activity. Specifically, the proposal largely restates the statutory definition of proprietary trading, defining that term to mean engaging in the purchase or sale of one or more covered financial positions as principal for the trading account of the banking entity.[86] The terms ''trading account'' and ''covered financial position'' are defined in §§ __.3(b)(2) and __.3(b)(3) of the proposed rule, respectively. The proposed definition of proprietary trading also clarifies that proprietary trading does not include acting as agent, broker, or custodian for an unaffiliated third party, because acting in these types of capacities does not involve trading as principal, which is one of the requisite aspects of the statutory definition.

b. ''Trading Account''

i. Definition of ''Trading Account''

Section 13(h)(6) of the BHC Act defines the term ''trading account'' as ''any account used for acquiring or taking positions in securities [or other enumerated instruments] principally for the purpose of selling in the near-term (or otherwise with the intent to resell in order to profit from short-term price movements),'' as well as any such other accounts that the Agencies by rule determine.[87] As an initial matter, the Agencies note that it is often difficult to clearly identify the purpose for which a position is acquired or taken and whether that purpose is short-term in nature, particularly since identification of that purpose generally depends on the intent with which the position is acquired or taken. Moreover, the statute does not define the terms ''near-term'' or ''short-term'' for these purposes.

In implementing the statutory definition of trading account, the proposed rule generally restates the statutory definition, with the addition of certain details intended to provide banking entities with greater clarity regarding the scope of positions that fall within the definition of trading account.[88] The proposed definition of trading account has three prongs. First, under the proposed rule, a trading account includes any account that is used by a banking entity to acquire or take one or more covered financial positions for the purpose of: (i) Short-term resale; (ii) benefitting from actual or expected short-term price movements; (iii) realizing short-term arbitrage profits; or (iv) hedging one or more such positions.[89] Second, the proposed definition of trading account also includes any account used by a banking entity that is subject to the Market Risk Capital Rules to acquire or take one or more covered financial positions that are subject to those rules, other than certain foreign exchange and commodity positions.[90] Third, the proposed definition of trading account also includes any account used by a banking entity that is a securities dealer, swap dealer, or security-based swap dealer to acquire or take positions in connection with its dealing activities.[91] To provide additional clarity and guidance regarding the trading account definition, the proposed rule also includes a rebuttable presumption that any account used to acquire or take a covered financial position that is held for sixty days or less is a trading account under the first prong, unless the banking entity can demonstrate that the position was not acquired principally for short-term trading purposes. The proposed definition also clarifies that no account will be a trading account to the extent that it is used to acquire or take certain positions under repurchase or reverse repurchase arrangements or securities lending transactions, positions for *bona fide* liquidity management purposes, or certain positions held by derivatives clearing organizations or clearing agencies. Each of the three definitional prongs is independent of the others—any one prong would, if met, cause the relevant account to fall within the definition of ''trading account.''

The Agencies have drawn on existing rules, in particular the Market Risk Capital Rules and various securities and commodities laws, in identifying trading accounts and defining related terms in the proposal.

ii. Positions Acquired or Taken for Short-Term Trading Purposes

The first prong of the proposed trading account definition refers to positions that a banking entity acquires or takes principally for short-term purposes—that is, for one of the following enumerated purposes described in §§ __.3(b)(2)(i)(A)(*1*) through (*4*) of the proposed rule:

- Short-term resale;
- Benefitting from actual or expected short-term price movements;
- Realizing short-term arbitrage profits; or
- Hedging one or more such positions.

This prong reflects the statutory definition's reference to positions acquired or taken ''principally for the purpose of selling in the near-term (or otherwise with the intent to resell in order to profit from short-term price movements).'' [92]

Section __.3(b)(2)(i)(A)(*1*) of the proposed rule's definition of trading account includes covered financial positions acquired or taken principally for the purpose of short-term resale.[93] This part of the trading account definition restates language contained in the statutory definition of trading account and describes one class of positions that are acquired or taken for short-term trading purposes.

Section __.3(b)(2)(i)(A)(*2*) of the proposed rule includes covered financial positions acquired or taken principally for the purpose of benefitting from actual or expected short-term price movements.[94] This part of the trading account definition does not require the *resale* of the position; rather, it requires only an intent to engage in any form of transaction on a short-term basis (including a transaction

[85] *See* proposed rule § __.3(b)(1).

[86] *See* 12 U.S.C. 1851(h)(4); *see also* proposed rule § __.3(b)(1). Although the statutory definition refers to the ''purchase, sale, acquisition, or disposition of'' covered financial positions, the proposed rule uses the simpler terms ''purchase'' and ''sale,'' which are defined broadly in §§ __.2(g) and (v) of the proposed rule.

[87] *See* 12 U.S.C. 1851(h)(6).

[88] The Agencies note that the structure of the proposed definition, which defines a trading account by reference to the positions that the account is used to acquire or take, is consistent with the structure of the statutory language used in section 13(h)(6) of the BHC Act.

[89] *See* proposed rule § __.3(b)(2)(i)(A).

[90] *See* proposed rule § __.3(b)(2)(i)(B).

[91] *See* proposed rule § __.3(b)(2)(i)(C).

[92] *See* 12 U.S.C. 1851(h)(6); *see also* proposed rule § __.3(b)(2)(i).

[93] *See* proposed rule § __.3(b)(2)(i)(A)(*1*).

[94] *See* proposed rule § __.3(b)(2)(i)(A)(*2*).

separate from, but related to, the initial acquisition of the position) for the purpose of benefitting from a short-term movement in the price of the underlying position. This part of the proposed definition would, for example, include a derivative or other position where the banking entity enters into (or intends to enter into) a subsequent transaction in the near-term to simply offset or ''close out,'' rather than sell, all or a portion of the risks of the initial position, in order to benefit from a price movement occurring between the acquisition of the underlying position and the subsequent offsetting transaction. Similarly, it would also include a derivative, commodity future, or other position that, regardless of the term of that position, is subject to the exchange of short-term variation margin through which the banking entity intends to benefit from short-term price movements. The proposed definition would also capture the acquisition of a debt instrument where the banking entity intends to enter into a short-term transaction to simply offset, rather than sell, the credit, interest rate and/or other material risk elements of the initial position so as to benefit from a price movement occurring between acquisition of the underlying position and the subsequent offsetting transaction.

Section __.3(b)(2)(i)(A)(*3*) of the proposed rule's definition of trading account includes covered financial positions acquired or taken principally to lock in short-term arbitrage profits.[95] Although similar to the positions described in § ____.3(b)(2)(i)(A)(*2*) of the proposed definition (i.e., those acquired for the purpose of benefitting from actual or expected short-term price movements), this part of the definition focuses on short-term arbitrage profits more generally, without regard to whether the transaction is predicated on expected or actual *movements* in price. Rather, a position acquired to lock in arbitrage profits would include positions acquired or taken with the intent to benefit from *differences* in multiple market prices, even in cases in which no movement in those prices is necessary to realize the intended profit. Such arbitrage-based transactions might involve profiting from the difference in the market price of multiple related positions or assets, or might instead involve the difference in market price for particular price or risk elements associated with positions or assets. This would include, for example, arbitrage profits resulting from the convergence or divergence in prices between different positions held by a banking entity engaged in relative value convergence arbitrage, which involves marrying a long and short position to benefit from a convergence or divergence in price between the two, or any similar strategy, because such convergence or divergence could happen at any time (i.e., in one day, in sixty-one days, or some other time period).

Section __.3(b)(2)(i)(A)(*4*) of the proposed rule's definition of trading account includes covered financial positions acquired or taken for the purpose of hedging another position that is itself held in a trading account.[96] In particular, the Agencies assume that, with respect to any position the purpose of which is to hedge another covered financial position in the trading account, the banking entity generally intends to hold the hedging position, whatever its nominal duration, for only so long as the underlying position is held. Accordingly, the proposed rule makes clear that such hedging positions fall within the definition of trading account.

iii. Overview of Current Market Risk Capital Rules Approach to Short-Term Trading Positions

The first prong of the proposed trading account definition, which references positions acquired principally for short-term trading purposes, is, like the statutory definition it implements, substantially similar to a key portion of the definition of a ''covered position'' under the Market Risk Capital Rules.[97] For the reasons discussed below, the Agencies have taken this similarity into account and propose to construe the first prong of the definition of trading account under the proposed rule—and in particular its reference to ''short-term''—in a manner that is consistent with the Market Risk Capital Rules' approach to identifying positions taken with short-term trading intent.

The Market Risk Capital Rules define a covered position to include all positions in a bank's ''trading account,'' as that term is defined, in part, in the Report of Condition and Income that banks are required to file periodically with respect to their financial condition (''Call Report''). Under the Market Risk Capital Rules, a covered position is one that is subject to a risk-based capital charge that is based, at least in part, on the banking organization's internal risk management models for purposes of calculating the banking organization's risk-based capital requirement.[98] In defining the term ''trading account,'' the Call Report notes that trading activities typically include, among other activities, ''acquiring or taking positions in such items principally for the purpose of selling in the near-term or otherwise with the intent to resell in order to profit from short-term price movements.'' [99] This language is substantially identical to the statutory

[95] *See* proposed rule § __.3(b)(2)(i)(A)(*3*).

[96] *See* proposed rule § __.3(b)(2)(i)(A)(*4*).

[97] The Federal banking agencies' current Market Risk Capital Rules are located at 12 CFR Part 3, Appendix B (OCC), 12 CFR Part 208, Appendix E and 12 CFR Part 225, Appendix E (Board), and 12 CFR Part 325, Appendix C (FDIC), and apply on a consolidated basis to banks and bank holding companies with trading activity (on a worldwide consolidated basis) that equals 10 percent or more of the institution's total assets, or $1 billion or more. On January 11, 2011, the Federal banking agencies proposed revisions to the Market Risk Capital Rules that include, *inter alia,* changes to the definition of covered position. Proposed revisions to the Market Risk Capital Rules include (i) changes to portions of the covered position definition not relevant to the statutory definition of trading account in section 13 of the BHC Act and (ii) the addition of a requirement that any position in a trading account also be a ''trading position'' in order to be considered a covered position. *See* 76 FR 1890 (Jan. 11, 2011). The revised definition of ''trading position'' that has been proposed for those purposes is generally identical to this proposed rule's definition of trading account (i.e., a position acquired or taken: (i) For the purpose of short-term resale; (ii) with the intent of benefitting from actual or expected short-term price movements; (iii) to lock in short-term arbitrage profits; or (iv) to hedge another trading position). The Agencies also note that the first prong of the proposed rule's trading account definition is also substantially similar to the Basel Committee's definition of ''trading book.'' *See* Basel Committee on Banking Supervision, *Amendment to the Capital Accord to Incorporate Market Risks, available at http://bis.org/publ/bcbs119.pdf.*

[98] The Agencies note that the Market Risk Capital Rules, both in their current and proposed form, also (i) include within the definition of covered position other positions not captured by the reference to positions acquired for the purpose of short-term resale or with the intent of benefitting from actual or expected short-term price movements (e.g., *all* commodity and foreign exchange positions, regardless of the intended holding period) and (ii) exclude from that definition certain positions otherwise acquired with short-term trading intent for a variety of policy reasons. The Agencies have not proposed to incorporate such inclusions or exclusions for purposes of the proposed rule's definition of trading account; rather, the Market Risk Capital Rules and related concepts have been referred to only to the extent that they pertain to positions acquired for the purpose of short-term resale or with the intent of benefitting from actual or expected short-term price movements.

[99] Report of Condition and Income at A78a (also including, in the definition of ''trading account,'' ''regularly underwriting or dealing in securities; interest rate, foreign exchange rate, commodity, equity, and credit derivative contracts; other financial instruments; and other assets for resale * * * and * * * acquiring or taking positions in such items as an accommodation to customers or for other trading purposes.''). Accordingly, given its broader scope, the Call Report ''trading account'' includes trading positions that fall outside the statutory ''trading account'' for purposes of determining what is prohibited and permitted covered trading activity under section 13 of the BHC Act.

definition of trading account in section 13 of the BHC Act in that it refers to acquiring or taking positions (i) principally for the purpose of selling in the near-term or (ii) otherwise with the intent to resell in order to profit from short-term price movements.

In providing guidance regarding the application of ''trading account,'' the Call Report also states that trading account positions include any position that is classified as ''trading securities'' under relevant U.S. Generally Accepted Accounting Principles (''GAAP'') standards for accounting.[100] Under the referenced accounting standards, trading securities are defined as those ''that are bought and held principally for the purpose of selling them in the near-term'' and ''generally used with the objective of generating profits on short-term differences in price.'' [101] The Agencies note that the definition of a trading security under the relevant U.S. GAAP accounting standards is similar to both (i) the financial positions described in the second prong of the Call Report's definition of trading account and (ii) the financial positions described in the statutory definition of trading account under section 13 of the BHC Act.

Although neither the Market Risk Capital Rules, the Call Report, nor relevant accounting standards provide a precise definition of what constitutes ''near-term'' or ''short-term'' for purposes of evaluating whether a position is of the type held in a trading account or is a trading security, guidance provided under relevant accounting standards notes that ''near-term'' for purposes of classifying trading activities is ''generally measured in hours and days rather than months or years.'' [102] The Agencies expect that the precise period of time that may be considered near-term or short-term for purposes of evaluating any particular covered financial position would depend on a variety of factors, including the facts and circumstances of the covered financial position's acquisition, the banking entity's trading and business strategies, and the nature of the relevant markets. In considering the purpose for which a covered financial position is acquired or taken and evaluating whether such position is acquired or taken for short-term purposes, the Agencies intend to rely on a variety of information, including quantitative measurements of banking entities' covered trading activities (as described below in Part II.B.5 of this Supplementary Information), supervisory review of banking entities' compliance practices and internal controls, and supervisory review of individual transactions.

In order to better reinforce the general consistency between the proposal's approach to defining a trading account and the ''trading account'' concept embedded in the Market Risk Capital Rules, the second prong of the proposed definition of trading account, contained in § __.3(b)(2)(i)(B) of the proposed rule, provides that a trading account includes any account used to acquire or take one or more covered financial positions, other than positions that are foreign exchange derivatives, commodity derivatives, or contracts of sale of a commodity for future delivery (unless the position is otherwise held with short-term intent), that are also market risk capital rule covered positions, if the banking entity, or any affiliate of the banking entity that is a bank holding company, calculates risk-based capital ratios under the Market Risk Capital Rules.[103] For these purposes, a ''market risk capital rule covered position'' is defined as any covered position as that term is defined for purposes of (i) in the case of a banking entity that is a bank holding company or insured depository institution, the market risk capital rule that is applicable to the banking entity, and (ii) in the case of a banking entity that is affiliated with a bank holding company, other than a banking entity to which a market risk capital rule is applicable, the market risk capital rule that is applicable to the affiliated bank holding company.[104] In particular, for banking entities already subject to the Market Risk Capital Rules, it appears that positions subject to trading account treatment under those rules because they involve short-term trading intent are generally the type of positions to which the proprietary trading restrictions of section 13 of the BHC Act were intended to apply. In addition, including all covered financial positions that receive trading account treatment under the Market Risk Capital Rules because they meet a nearly identical standard regarding short-term trading intent would also eliminate the potential for inconsistency or regulatory arbitrage in which a banking entity might characterize a position as ''trading'' for capital purposes but not for purposes of the proposed rule.

The Agencies emphasize that this second prong of the trading account definition is being proposed in contemplation of the proposed revisions to the Market Risk Capital Rules and, in particular, the proposed definition of ''covered position'' under those proposed revisions. To the extent that those proposed revisions with respect to the definition of ''covered position'' are not adopted, or adopted in a form other than as proposed, the Agencies would expect to take that into account in determining whether or how to include the proposed second prong of the trading account definition for purposes of the final rule to implement section 13 of the BHC Act.[105]

iv. Positions Acquired or Taken by Securities Dealers, Swap Dealers, and Security-Based Swap Dealers

The third prong of the proposed definition of trading account is contained in § __.3(b)(2)(i)(C) of the

[100] *See* Report of Condition and Income at A78a, referring to ASC Topic 320, Investments—Debt and Equity Securities (formerly FASB Statement of Financial Accounting Standards No. 115, ''Accounting for Certain Investments in Debt and Equity Securities'').

[101] *See id.* In formulating the proposed rule, the Agencies carefully considered whether to define trading account for purposes of the proposed rule in a manner that formally incorporated the accounting standards governing trading securities. The Agencies have not proposed this approach because: (i) The statutory proprietary trading prohibition under section 13 of the BHC Act applies to financial instruments, such as derivatives, to which the trading security accounting standards may not apply; (ii) these accounting standards permit companies to classify, at their discretion, assets as trading securities even where the assets would not otherwise meet the definition of trading security; and (iii) these accounting standards could change in the future without consideration of the potential impact on section 13 of the BHC Act.

[102] *See* FASB ASC Master Glossary definition of ''trading.'' Although § __.3(b)(2)(ii) of the proposed rule includes a rebuttable presumption that an account used to acquire or take certain covered financial positions that are held for 60 days or less is a trading account, the Agencies note that U.S. GAAP does not include a presumption that securities sold within 60 days of acquisition were held for the purpose of selling them in the near term.

[103] The Agencies have excluded positions that are foreign exchange derivatives, commodity derivatives, or contracts of sale of a commodity for future delivery from this prong of the proposed trading account definition because all foreign exchange and commodity positions are considered ''covered positions'' under the Market Risk Capital Rules regardless of whether they involve the short-term trading intent required under the statutory definition of trading account in section 13(h)(6) of the BHC Act.

[104] *See* proposed rule § __.3(c)(8). Accordingly, in the context of a subsidiary of a bank holding company (other than a subsidiary, such as a bank, to which a market risk capital rule is already directly applicable), if that bank holding company is subject to a market risk capital rule, any position of that subsidiary that meets the definition of a ''covered position'' under the market risk capital rule applicable to the bank holding company would be subject to § __.3(b)(2)(i)(B) of the proposed rule.

[105] In particular, the Agencies note that under the proposed revisions to the Market Risk Capital Rules, but not the existing Market Risk Capital Rule, the term ''covered position'' expressly includes, other than with respect to commodity and foreign exchange positions, only positions taken with short-term trading intent. *See* 76 FR 1890 (Jan. 11, 2011). The Agencies do not intend to incorporate ''covered positions'' under the Market Risk Capital Rules in a way that includes positions lacking short-term trading intent.

proposed rule and provides that a trading account includes *any account* used to acquire or take one or more covered financial positions by a banking entity that is: (i) A SEC-registered securities or municipal securities dealer; (ii) a government securities dealer that registered, or that has filed notice, with an appropriate regulatory agency; [106] (iii) a CFTC-registered swap dealer; or (iv) a SEC-registered security-based swap dealer, in each case to the extent that the covered financial position is acquired or taken in connection with the activities that require the banking entity to be registered, or to file notice, as such.[107] Similarly included is any covered financial position acquired or taken by a banking entity that is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, if such position is acquired or taken in connection with the activities of such business.[108] As a result of this third prong, all covered financial positions acquired or taken by a registered dealer, swap dealer or security-based swap dealer, a government securities dealer that has filed notice with an appropriate regulatory agency, or a banking entity engaged in the same type of dealing activities outside the United States, are automatically included within the scope of positions described in the trading account definition, if they are acquired or taken in connection with the activities that require the banking entity to be registered, or file notice, as such (or, in the case of a banking entity engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, in connection with the activities of such business). As discussed below, the proposed rule contains exemptions that permit a variety of covered trading activity in which these types of entities typically engage, notwithstanding the inclusion of all covered financial positions of such entities within the definition of trading account.

The Agencies have proposed this third prong of the trading account definition because all assets or other positions held by firms that register or file notice as securities or derivatives dealers as part of their dealing activity are generally held for sale to customers upon request or otherwise support the firm's trading activities (e.g., by hedging its dealing positions), and so would appear to involve the requisite short-term intent and be captured within the statutory definition of trading account. To the extent that a covered financial position is acquired or taken by such a banking entity outside the scope of the dealing activities that require the banking entity to be registered, or to file notice, as a dealer, swap dealer, or security-based swap dealer, that position may still cause the relevant account to be a trading account under the proposed rule if the account holding such a position otherwise meets the terms of the first or second prong of the trading account definition (i.e., positions acquired or taken for short-term trading purposes or certain Market Risk Capital Rules positions).

v. Rebuttable Presumption for Certain Positions

In order to provide greater clarity and guidance on the application of the trading account definition, and in particular for those banking entities with no experience in evaluating short-term trading intent or that are not subject to the Market Risk Capital Rules, the proposed rule also includes a rebuttable presumption regarding certain positions that, by reason of their holding period, are presumed to be trading account positions. In particular, § __.3(b)(2)(ii) of the proposed rule provides that an account would be presumed to be a trading account if it is used to acquire or take a covered financial position, other than dealing positions or certain Market Risk Capital Rules covered positions that are automatically considered part of the trading account, that the banking entity holds for a period of sixty days or less. However, the presumption does not apply if the banking entity can demonstrate, based on all the facts and circumstances, that the covered financial position, either individually or as a category, was not acquired or taken principally for the purpose of short-term resale, benefitting from short-term price movements, realizing short-term arbitrage profits, or hedging another trading account position.[109] Because it appears likely that most positions held for sixty days or less would have been acquired with short-term trading intent, the proposal presumes such positions are trading account positions unless the banking entity can demonstrate otherwise. The purpose of the proposed rebuttable presumption is to simplify the process of evaluating whether individual positions are included in the definition of trading account. The proposal does not apply this rebuttable presumption to positions described in § __.3(b)(2)(i)(B) or (C) of the proposed rule (i.e., certain Market Risk Capital Rules positions and dealing positions), because these positions are automatically part of the trading account, and cannot be rebutted.

However, the Agencies recognize that, for a variety of reasons, a banking entity may acquire a covered financial position for purposes other than short-term trading but nonetheless dispose of that position within the sixty-day period covered by the presumption. Accordingly, § __.3(b)(2)(ii) is only a *presumption,* and may be rebutted by reference to all the facts and circumstances surrounding the acquisition of a particular position. For example, if a banking entity acquired a covered financial position with the demonstrable intent of holding it for investment or other non-trading purposes but, because of developments not expected or anticipated at the time of acquisition (e.g., increased customer demand, an unexpected increase in its volatility or a need to liquidate the position to meet unexpected liquidity demands), held it for less than sixty days, those facts and circumstances would generally suggest that the position was not acquired with short-term trading intent, notwithstanding the presumption.[110] The proposed rule also makes clear that this rebuttal may be made not only with respect to a particular transaction, but also with respect to a particular category of transactions, recognizing that it may be possible to identify a category of similar

[106] *See* 15 U.S.C. 78c(a)(42)(E); 15 U.S.C. 78*o*5(a)(1)(B); 17 CFR 400.5(b); 17 CFR 449.1. Section 15C(a)(1)(A) of the Exchange Act requires any government securities dealer, other than a registered broker-dealer or a financial institution, to register with the SEC pursuant to section 15C(a)(2). Registered broker-dealers and financial institutions are required to file written notice with their appropriate regulatory agency, as defined in section 3(a)(34) of the Exchange Act, prior to acting as a government securities dealer. *See* 15 U.S.C. 78o–5(a)(1)(B). The proposed definition of trading account would cover positions of all three forms of government securities dealers: (i) those registered with the SEC; (ii) registered broker-dealers; and (iii) financial institutions that have filed notice with an appropriate regulatory agency.

[107] *See* proposed rule § __.3(b)(2)(i)(C)(1)–(4). The Agencies emphasize that this provision applies only to positions taken in connection with the activities that require the banking entity to be registered as one of the listed categories of dealer, not to *all* of the activities of that banking entity. For example, an insured depository institution may be registered as a swap dealer, but only the swap dealing activities that require it to be so registered would be covered by the second prong of the trading account definition. A position taken in connection with other activities of the insured depository institution that do not trigger registration as a swap dealer, such as lending, deposit-taking, the hedging of business risks, or other end-user activity, would only be included within the trading account if the position met one of the other prongs of the trading account definition (i.e., §§ __.3(b)(2)(i)(A) or (B) of the proposed rule).

[108] *See* proposed rule § __.3(b)(2)(i)(C)(5).

[109] *See* proposed rule § __.3(b)(2)(ii).

[110] In such cases, the documented intention for acquiring or taking the position should be consistent with the intention articulated for financial reporting and other purposes.

transactions that clearly do not involve short-term trading, notwithstanding the typical holding period of the related positions.

It is important to note that these presumptions are designed to help determine whether a transaction is within the definition of ''proprietary trading,'' not whether a transaction is permissible under section 13 of the BHC Act. A transaction may fall within the definition of ''proprietary trading'' and yet be permissible if it meets one of the exemptions provided in the proposed rule, such as the exemption for market making-related activities.

vi. Request for Comment

The Agencies request comment on the proposed rule's approach to defining trading account. In particular, the Agencies request comment on the following questions:

Question 14. Is the proposed rule's definition of trading account effective? Is it over- or under-inclusive in this context? What alternative definition might be more effective in light of the language and purpose of the statute? How would such definition better identify the accounts that are intended to be covered by section 13 of the BHC Act?

Question 15. Is the proposed rule's approach for determining when a position falls within the definition of ''trading account'' for purposes of the proposed rule from when it must be reported in the ''trading account'' for purpose of filing the Call Report effective? What additional guidance could the Agencies provide on this distinction? Are there alternative approaches that would be more effective in light of the language and purpose of the statute? Is this approach workable for affiliates of bank holding companies that are not subject to the Federal banking agencies' market Risk Capital Rules (e.g., affiliated investment advisers)? If not, why not? Are affiliates of bank holding companies familiar with the concepts from the Market Risk Capital Rules that are being incorporated into the proposed rule? If not, what steps would an affiliate of a bank holding company have to take to become familiar with these concepts and what would be the costs and/or benefits of such actions? Is application of the trading account concept from the Federal banking agencies' Market Risk Capital Rules to affiliates of bank holding companies necessary to promote consistency and prevent regulatory arbitrage? Please explain.

Question 16. Is the manner in which the Agencies intend to take into account, and substantially adopt, the approach used in the Market Risk Capital Rules and related concepts for determining whether a position is acquired with short-term trading intent effective?

Question 17. Should the proposed rule's definition of trading account, or its use of the term ''short-term,'' be clarified? Are there particular transactions or positions to which its application would be unclear? Should the proposed rule define ''short-term'' for these purposes? What alternative approaches to construing the term ''short-term'' should the Agencies consider and/or adopt?

Question 18. Are there particular transactions or positions to which the application of the proposed definition of trading account is unclear? Is additional regulatory language, guidance, or clarity necessary?

Question 19. Is the exchange of variation margin as a potential indicator of short-term trading in derivative or commodity future transactions appropriate for the definition of trading account? How would this impact such transactions or the manner by which banking entities conduct such transactions? For instance, would banking entities seek to avoid the use of variation margin to avoid this rule? What are the costs and benefits of referring to the exchange of variation margin to determine if positions should be included in a banking entity's trading account? Please explain.

Question 20. Are there particular transactions or positions that are included in the definition of trading account that should not be? If so, what transactions or positions and why?

Question 21. Are there particular transactions or positions that are not included in the definition of trading account that should be? If so, what transactions or positions and why?

Question 22. Is the proposed rule of construction for positions acquired or taken by dealers, swap dealers and security-based swap dealers appropriate and consistent with the purpose and language of section 13 of the BHC Act? Is its application to any particular type of entity, such as an insured depository institution engaged in derivatives dealing activities, sufficiently clear and effective? If not, what alternative would be clearer and/or more effective?

Question 23. Is the rebuttable presumption included in the proposed rule appropriate and effective? Are there more effective ways in which to provide clarity regarding the determination of whether or not a position is included within the definition of trading account? If so, what are they?

Question 24. Are records currently created and retained that could be used to demonstrate investment or other non-trading purposes in connection with rebutting the presumption in the proposed rule? If yes, please identify such records and explain when they are created and whether they would be useful in connection with a single transaction or a category of similar transactions. If no, we seek commenter input regarding the manner in which banking entities might demonstrate investment or other non-trading intent. Should the Agencies require banking entities to make and keep records to demonstrate investment or non-trading intent with respect to their covered financial positions?

Question 25. How should the proposed trading account definition address arbitrage positions? Should all arbitrage positions be included in the definition of trading account, unless the timing of such profits is long-term and established at the time the arbitrage position is acquired or taken? Please explain in detail, including a discussion of different arbitrage trading strategies and whether subjecting such strategies to the proposed rule would be consistent with the language and purpose of section 13 of the BHC Act.

Question 26. Is the holding period referenced in the rebuttable presumption appropriate? If not, what holding period would be more appropriate, and why?

Question 27. Should the proposed rule include a rebuttable presumption regarding positions that are presumed *not* to be within the definition of trading account? If so, why, and what would the presumption be?

Question 28. Should any additional accounts be included in the proposed rule pursuant to the authority granted under section 13(h)(6) of the BHC Act? If so, what accounts and why? For example, should accounts used to acquire or take certain long-term positions be included in the definition? If so, how would subjecting such accounts to the proposed rule's prohibitions and restrictions be consistent with the language and purpose of section 13 of the BHC Act?

Question 29. Do any of the activities currently engaged in by issuers of asset-backed securities that would be considered a banking entity constitute proprietary trading as defined by § __.3(b) of this rule proposal? Would any activities relating to investment of funds in accounts held by issuers of asset-backed securities (e.g., reserve accounts, prefunding accounts, reinvestment accounts, etc.) or the purchase and sale of securities as part

of the management of a collateralized debt obligation portfolio be considered proprietary trading under the proposed rule? What would be the potential impact of the prohibition on proprietary trading on the use of such accounts in (i) existing securitization transactions and (ii) future securitization transactions? Would any of the securities typically acquired and retained using these accounts be considered an ownership interest in a covered fund under the proposed rule? Does the exclusion of trading in certain government obligations in § __.6(a) of the proposed rule mitigate the impact of the proposed rule on such issuers of asset-backed securities and their activities? Why or why not?

c. Excluded Positions

i. Excluded Positions Under Certain Repurchase and Reverse Repurchase Arrangements

Section __.3(b)(2)(iii)(A) of the proposed rule's definition of trading account provides that an account will not be a trading account to the extent that such account is used to acquire or take one or more covered financial positions that arise under a repurchase or reverse repurchase agreement pursuant to which the banking entity has simultaneously agreed, in writing at the start of the transaction, to both purchase and sell a stated asset, at stated prices, and on stated dates or on demand with the same counterparty.[111] This clarifying exclusion is proposed because positions held under a repurchase or reverse repurchase agreement operate in economic substance as a secured loan, and are not based on expected or anticipated movements in asset prices. Accordingly, these types of asset purchases and sales do not appear to be the type of transaction intended to be covered by the statutory definition of trading account.

ii. Excluded Positions Under Securities Lending Transactions

Section __.3(b)(2)(iii)(B) of the proposed rule's definition of trading account provides that an account will not be a trading account to the extent that such account is used to acquire or take one or more covered financial positions that arise under a transaction in which the banking entity lends or borrows a security temporarily to or from another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such security, and has the right to terminate the transaction and to recall the loaned security on terms agreed to by the parties.[112] This clarifying exclusion is proposed because a position held under a securities lending arrangement can be used, for example, to operate in economic substance and function, as a means to facilitate settlement of securities transactions, and is not based on expected or anticipated movements in asset prices. Accordingly, securities lending transactions do not appear to be the type of transaction intended to be covered by the statutory definition of trading account.

iii. Excluded Positions Acquired or Taken for Liquidity Management Purposes

Section ____.3(b)(2)(iii)(C) of the proposed definition of trading account provides that an account will not be a trading account to the extent that such account is used to acquire or take a position for the purpose of *bona fide* liquidity management, so long as important criteria are met.[113]

This proposed clarifying exclusion is intended to make clear that, where the purpose for which a banking acquires or takes a position is to ensure that it has sufficient liquid assets to meet its short-term cash demands, and the related position is held as part of the banking entity's liquidity management process, that transaction falls outside of the types of transactions described in the proposed rule's definition of trading account. Maintaining liquidity management positions is a critical aspect of the safe and sound operation of certain banking entities, and does not involve the requisite short-term trading intent that forms the basis of the statutory definition of ''trading account.'' In the context of *bona fide* liquidity management activity that would qualify for the clarifying exclusion, a banking entity's purpose for acquiring or taking these types of positions is not to benefit from short-term profit or short-term price movements, but rather to ensure that it has sufficient, readily-marketable assets available to meet its expected short-term liquidity needs.

However, the Agencies are concerned with the potential for abuse of this clarifying exclusion—specifically, that a banking entity might attempt to improperly mischaracterize positions acquired or taken for prohibited proprietary trading purposes as positions acquired or taken for liquidity management purposes. To address this, the proposed rule requires that the transaction be conducted in accordance with a documented liquidity management plan that meets five criteria. First, the plan would be required to specifically contemplate and authorize any particular instrument used for liquidity management purposes, its profile with respect to market, credit and other risks, and the liquidity circumstances in which the position may or must be used. Second, the plan would have to require that any transaction contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position acquired or taken for such short-term purposes. Third, the plan would have to require that any positions acquired or taken for liquidity management purposes be highly liquid and limited to financial instruments the market, credit and other risks of which are not expected to give rise to appreciable profits or losses as a result of short-term price movements.[114] Fourth, the plan would be required to limit any position acquired or taken for liquidity management purposes, together with any other positions acquired or taken for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations, as estimated and documented pursuant to methods specified in the plan. Fifth, the plan would be required to be consistent with the relevant Agency's supervisory requirements, guidance and expectations regarding liquidity management. The Agencies would review these liquidity plans and transactions effected in accordance with these plans through supervisory and examination processes to ensure that the applicable criteria are met and that any position acquired or taken in reliance on the clarifying exclusion for liquidity management transactions is fully consistent with such plans.

[111] *See* proposed rule § __.3(b)(2)(iii)(A).

[112] *See* proposed rule § ____.3(b)(2)(iii)(B). The language describing securities lending transactions in the proposed rule generally mirrors that contained in Rule 3a5–3 under the Exchange Act. *See* 17 CFR 240.3a5–3.

[113] *See* proposed rule § ____.3(b)(2)(iii)(C).

[114] Any instance in which positions characterized as taken for liquidity purposes do give rise to appreciable profits or losses as a result of short-term price movements will be subject to significant Agency scrutiny and, absent compelling explanatory facts and circumstances, would be viewed as prohibited proprietary trading under the proposal.

iv. Excluded Positions of Derivatives Clearing Organizations and Clearing Agencies

Section __.3(b)(2)(iii)(D) of the proposed rule's definition of trading account provides that an account will not be a trading account to the extent that such account is used to acquire or take one or more covered financial positions that are acquired or taken by a banking entity that is a derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) or a clearing agency registered with the SEC under section 17A of the Exchange Act (15 U.S.C. 78q–1) in connection with clearing derivatives or securities transactions.[115] This clarifying exclusion is proposed because, in the case of a banking entity that acts as a registered, central counterparty in the securities or derivatives markets, these types of transactions do not appear to be the type of transaction intended to be covered by the statutory definition of trading account, as the purpose of such transactions is to provide a clearing service to third parties and not to profit from short-term resale or short-term price movements.

v. Request for Comment

The Agencies request comment regarding the proposed clarifying exclusions and whether any other types of activity or transactions should be excluded from the proposed definition of trading account for clarity. In particular, the Agencies request comment on the following questions:

Question 30. Are the proposed clarifying exclusions for positions under certain repurchase and reverse repurchase arrangements and securities lending transactions over- or under-inclusive and could they have unintended consequences? Is there an alternative approach to these clarifying exclusions that would be more effective? Are the proposed clarifying exclusions broad enough to include *bona fide* arrangements that operate in economic substance as secured loans and are not based on expected or anticipated movements in asset prices? Are there other types of arrangements, such as open dated repurchase arrangements, that should be excluded for clarity and, if so, how should the proposed rule be revised? Alternatively, are the proposed clarifying exclusions narrow enough to not inadvertently exclude from coverage any similar arrangements or transactions that do not have these characteristics?

Question 31. Are repurchase and reverse repurchase arrangements and securities lending transactions sufficiently similar that they should be treated in the same way for purposes of the proposed rule? Are there aspects of repurchase and reverse repurchase arrangements or securities lending transactions that should be highlighted in considering the application of the proposed rule? Do repurchase and reverse repurchase arrangements or securities lending transactions raise any additional or heightened concerns regarding risk? Please identify and explain how these concerns should be reflected in the proposed rule.

Question 32. Are the proposed exclusions for repurchase and reverse repurchase arrangements and securities lending transactions appropriate or are there conditions that commenters believe would be appropriate as a pre-requisite to relying on these exclusions? Please identify such conditions and explain. Alternatively, we seek commenter input regarding why repurchase and reverse repurchase arrangements and securities lending transactions do not present the potential for abuse, namely, that a banking entity might attempt to improperly mischaracterize prohibited proprietary trading as activity that qualifies for the proposed exclusions.

Question 33. Is the proposed clarifying exclusion for liquidity management transactions effective and appropriate? If not, what alternative would be more effective and appropriate, and why? Is the proposed exclusion under- or over-inclusive? Does the proposed clarifying exclusion place sufficient limitations on liquidity management transactions to prevent abuse of the clarifying exclusion? If not, what additional limitations should be specified? Are any of the limitations contained in the proposed rule inappropriate or unnecessary? If so, how could such limitations be eliminated or altered in way that does not permit abuse of the clarifying exclusion?

Question 34: Is the proposed exclusion for liquidity management positions necessary? If not excluded, would such activity otherwise qualify for an exemption contained in the proposed rule (e.g., the exemptions contains in §§ ____.5 and ____.6(a) of the proposed rule)? What types of banking entities are likely to engage in the liquidity management activities described in the proposed exclusion?

Question 35: What types of instruments do particular types of banking entities currently use in connection with liquidity management activities (e.g., Treasuries)? Why are such instruments chosen for liquidity management purposes? Would such instruments meet the proposed requirement that the position be highly liquid and limited to financial instruments the market, credit and other risk of which are not expected to give rise to appreciable profits or losses as a result of short-term price movements? Why or why not?

Question 36: What methodologies do banking entities currently use for estimating deviations from normal operations in connection with liquidity management programs?

Question 37: Which unit or units within a banking entity are typically responsible for liquidity management? What is the typical reporting line structure used to control and supervise that unit or units? Are the responsibilities of personnel in the unit limited to liquidity management or do they perform other functions in addition to liquidity management? How is compensation determined for personnel in the unit of the banking entity responsible for liquidity management?

Question 38: Would current liquidity management programs meet the five proposed criteria for liquidity management programs? If not which criteria would not be met, and why? What effect would the proposed liquidity management exclusions have on current liquidity management programs and banking entities in general?

Question 39: Are liquidity management programs used for purposes other than ensuring the banking entity has sufficient assets available to it that are readily marketable to meet expected short-term liquidity needs? If so, for what purposes, and why?

Question 40: What costs or other burdens would arise if the proposal did not contain an exclusion for positions acquired or taken for liquidity management purpose? Please explain and quantify these costs or other burdens in detail.

Question 41: Is the proposed liquidity management exclusion sufficiently clear? If not, why is the exclusion unclear and how should the Agencies clarify the terms of this exclusion?

Question 42. Is the proposed clarifying exclusion for certain positions taken by derivatives clearing organizations and clearing agencies effective and appropriate? If not, what alternative would be more effective and appropriate, and why?

Question 43. Are any additional clarifying exclusions warranted? If so, what clarifying exclusion, and why?

[115] *See* proposed rule § ____.3(b)(2)(iii)(D).

Question 44. Should the proposed definition exclude any position the market risk of which cannot be hedged by the banking entity in a two-way market?[116] If so, what would be the basis for concluding that such positions are clearly not within the statutory definition of trading account?

Question 45. Should the proposed definition include a clarifying exclusion for any position in illiquid assets? If so, what would be the basis for concluding that such positions are clearly not within the statutory definition of trading account? How should ''illiquid assets'' be defined for these purposes? Should the definition be consistent with the definition given that term in the Board's Conformance Rule under section 13 of the BHC Act (12 CFR 225.180 et seq.)? [117]

d. Covered Financial Position

i. Definition of ''Covered Financial Position''

Section __.3(b)(3)(i) of the proposed rule defines a covered financial position as any long, short, synthetic or other position[118] in: (i) A security, including an option on a security; (ii) a derivative, including an option on a derivative; or (iii) a contract of sale of a commodity for future delivery, or an option on such a contract. The types of financial instruments described in the proposed definition are consistent with those referenced in section 13(h)(4) of the BHC Act as part of the statutory definition of proprietary trading.[119]

To provide additional clarity, § ____.3(b)(3)(ii) of the proposed rule provides that, consistent with the statute, the term covered financial position does not include any position that is itself a loan, a commodity, or foreign exchange or currency.[120] The exclusion of these types of positions is intended to eliminate potential confusion by making clear that the purchase and sale of loans, commodities and foreign exchange—none of which are referred to in section 13(h)(4) of the BHC Act—are outside the scope of transactions to which the proprietary trading restrictions apply. The reference in § ____.3(b)(3)(ii) to a position that *is,* rather than a position that *is in,* a loan, a commodity, or foreign exchange or currency is intended to capture only the purchase and sale of these instruments themselves. This reflects the fact that, consistent with section 13(h)(4) of the BHC Act and the proposed rule, although a position that is a foreign exchange derivative or commodity derivative is included in the definition of covered financial position and therefore subject to the prohibition on proprietary trading, a position that is a commodity or foreign currency is not.[121] For example, the spot purchase of a commodity would meet the terms of the exclusion, but the acquisition of a futures position in the same commodity would not. The Agencies request comment on the proposed rule's definition of covered financial position. In particular, the Agencies request comment on the following questions:

Question 46. Is the proposed rule's definition of covered financial position effective? Is the definition over- or under-inclusive? What alternative approaches might be more effective in light of the language and purpose of section 13 of the BHC Act, and why?

Question 47. Are there definitions in other rules or regulations that might inform the proposed definition of covered financial position? If so, what rule or regulation? How should that approach be incorporated into the proposed definition? Why would that approach be more appropriate?

Question 48. Are there particular transactions or positions to which the application of the proposed definition of covered financial position is unclear? Is additional regulatory language, guidance, or clarity necessary?

Question 49. The proposal would apply to long, short, synthetic, or other positions in one of the listed categories of financial instruments. Does this language adequately describe the type of positions that are intended to fall within the proposed definition of covered financial position? If not, why not? Are there different or additional concepts that should be specified in this context? Please explain.

Question 50. Should the Agencies expand the scope of covered financial positions to include other transactions, such as spot commodities or foreign exchange or currency, or certain subsets of transaction (e.g., spot commodities or foreign exchange or currency traded on a high-frequency basis)? If so, which instruments and why?

Question 51. What factors should the Agencies consider in deciding whether to extend the scope of the proprietary trading restriction to other financial instruments under the authority granted in section 13(h)(4) of the BHC Act? Please explain.

Question 52. Is the proposed exclusion of any position that is a loan, a commodity, or foreign exchange or currency effective? If not, what alternative approaches might be more effective in light of the language and purpose of section 13 of the BHC Act? Should additional positions be excluded? If so, why and under what authority?

ii. Other Terms Used in the Definition of Covered Financial Position

The proposal also defines a number of terms used in the proposed definition of covered financial position. The term ''security'' is defined by reference to that same term under the Exchange Act.[122] The terms ''commodity'' and ''contract of sale of a commodity for future delivery'' are defined by reference to those same terms under the Commodity Exchange Act.[123] The Agencies have proposed to reference these existing definitions from the securities and commodities laws because these existing definitions are generally well-understood by market participants and have been subject to extensive interpretation in the context of securities and commodities trading activities.

The proposed rule also defines the term ''derivative.'' [124] In particular, the

[116] The Agencies also note that such an exclusion would be similar to the express exclusion of similar positions under the Federal banking agencies' most recent proposed revisions to the Market Risk Capital Rules. *See* 76 FR 1890, 1912 (Jan. 11, 2011) (excluding from the definition of a covered position any position the material risk elements of which the holder is unable to hedge in a two-way market).

[117] *See* 76 FR 8265 (Feb. 14, 2011). The Board's conformance rule defines ''illiquid asset'' as ''any real property, security obligation, or other asset that (i) is not a liquid asset; (ii) because of statutory or regulatory restrictions applicable to the hedge fund, private equity fund or asset, cannot be offered, sold, or otherwise transferred by the hedge fund or private equity fund to a person that is unaffiliated with the relevant banking entity; or (iii) because of contractual restrictions applicable to the hedge fund, private equity fund or asset, cannot be offered, sold, or otherwise transferred by the hedge fund or private equity fund for a period of 3 years or more to a person that is unaffiliated with the relevant banking entity.'' 12 CFR 225.180(g). A ''liquid asset'' is defined in paragraph (h) of the conformance rule. *See* 12 CFR 225.180(h).

[118] The proposed definition's reference to any ''long, short, synthetic or other position'' is intended to make clear that a position in an identified category of financial instrument qualifies as a covered financial position regardless of whether the position is (i) an asset or liability or (ii) is acquired through acquisition or sale of the financial instrument or synthetically through a derivative or other transaction.

[119] Section 13(h)(4) of the BHC Act also permits the Agencies to extend the scope of the proprietary trading restrictions to other financial instruments. The Agencies have not proposed to do so at this time.

[120] *See* proposed rule § ____.3(b)(ii).

[121] The types of commodity- and foreign exchange-related derivatives that are included within the definition of ''derivative'' under the proposed rule are discussed in detail below in Part III.B.2.d.ii of this Supplementary Information.

[122] *See* proposed rule § ____.2(w).

[123] *See* proposed rule §§ ____.3(c)(1), (2).

[124] *See* proposed rule § ____.2(l).

definition of ''derivative'' under the proposed rule includes any ''swap'' (as that term is defined in the Commodity Exchange Act) and any ''security-based swap'' (as that term is defined in the Exchange Act), in each case as further defined by the CFTC and SEC by joint regulation, interpretation, guidance, or other action, in consultation with the Board pursuant to section 712(d) of the Dodd-Frank Act. The Agencies have proposed to incorporate these definitions of ''swap'' and ''security-based swap'' under the Federal securities and commodities laws because those definitions: (i) Govern the primary Federal regulatory scheme applicable to exchange-traded and over-the-counter derivatives; (ii) will be frequently evaluated and applied by banking entities in the course of their trading activities; and (iii) capture agreements and contracts that are or function as derivatives.[125] The proposed rule also includes within the definition of derivative certain other transactions that, although not included within the definition of ''swap'' or ''security-based swap,'' also appear to be, or operate in economic substance as, derivatives, and which if not included could permit banking entities to engage in proprietary trading that is inconsistent with the spirit of section 13 of the BHC Act. Specifically, the proposed definition of derivative also includes: (i) Any purchase or sale of a nonfinancial commodity for deferred shipment or delivery that is intended to be physically settled; (ii) any foreign exchange forward or foreign exchange swap (as those terms are defined in the Commodity Exchange Act);[126] (iii) any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));[127] (iv) any agreement, contract, or transactions in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and (v) any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b)). The Agencies are requesting comment on whether including these five types of transactions within the proposed definition of derivative is appropriate.

To provide additional clarity, the proposed definition of derivative also clarifies two types of transactions that are outside the scope of the definition. First, the proposed definition of derivative would not include any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, guidance, or other action as not within the definition of swap, as that term is defined in the Commodity Exchange Act, or security-based swap, as that term is defined in the Exchange Act. The SEC and CFTC have, in proposing rules further defining the terms ''swap'' and ''security-based swap,'' proposed to not include a variety of agreements, contracts, and transactions within those definitions by joint regulation or interpretation, and the Agencies have proposed to expressly reflect such exclusions in the proposed rule's definition in order to avoid the potential application of its restrictions to transactions that are not commonly thought to be derivatives.[128] Second, the proposed definition of derivative also does not include any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)). This provision is proposed to clearly exclude identified banking products that are expressly excluded (i) from the definition of ''security-based swap'' and (ii) from Commodity Exchange Act and CFTC jurisdiction pursuant to section 403(a) of the Legal Certainty for Bank Products Act of 2000.[129]

The proposed rule defines a ''loan'' as any loan, lease, extension of credit, or secured or unsecured receivable.[130] The Agencies note that the proposed definition of loan is expansive, and includes a broad array of loans and similar credit transactions, but does *not* include any asset-backed security that is issued in connection with a loan securitization or otherwise backed by loans.

The Agencies request comment on the proposed rule's definition of terms used in the definition of covered financial position. In particular, the Agencies request comment on the following questions:

Question 53. Are the proposed rule's definitions of commodity and contract of sale of a commodity for future delivery appropriate? If not, what

[125] The Agencies note that they have not included a variety of security-related derivatives within the proposed definition of derivative, as such transactions are ''securities'' for purposes of both the Exchange Act and the proposed rule and, as a result, already included in the broader definition of ''covered financial position'' to which the prohibition on proprietary trading applies.

[126] The Agencies note that foreign exchange swaps and foreign exchange forwards are considered swaps for purposes of the Commodity Exchange Act definition of that term unless the Secretary of the Treasury determines, pursuant to section 1a(47)(E) of that Act (7 U.S.C. 1a(47)(E)), that foreign exchange swaps and forwards should not be regulated as swaps under the Commodity Exchange Act and are not structured to evade certain provisions of the Dodd-Frank Act. On May 5, 2011, the Treasury Secretary proposed to exercise that authority to exclude foreign exchange forwards and foreign exchange swaps from the definition of ''swap.'' *See Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act,* 76 FR 25774 (May 5, 2011). If the Secretary of the Treasury issues a final determination, as proposed, a ''foreign exchange swap'' and ''foreign exchange forward'' would be excluded from the definition of ''swap'' under the Commodity Exchange Act and, therefore, would fall outside of the proposed rule's definition of ''derivative.'' Accordingly, the Agencies have proposed to expressly include such transactions in the proposed definition of derivative, but have requested comment on a variety of questions related to whether foreign exchange swaps and forwards should be included or excluded from the definition of derivative. The Agencies note that, aside from foreign exchange swaps and forwards, the Commodity Exchange Act's definition of ''swap'' (and therefore the proposed definition of ''derivative'') also includes other types of foreign exchange derivatives, including non-deliverable foreign exchange forwards (NDFs), foreign exchange options, and currency options, which fall outside of the Secretary of the Treasury's authority to issue a determination to exclude certain transactions from the ''swap'' definition.

[127] Section 2(c)(2)(C)(i) was added to the Commodity Exchange Act in 2008 to address retail foreign exchange transactions that were documented as automatically renewing spot contracts (so-called rolling spot transactions) and therefore not futures contracts subject to the Commodity Exchange Act, but which were functionally and economically similar to futures. *See Retail Foreign Exchange Transactions,* 76 FR 41375, 47376–77 (July 15, 2011). However, section 2(c)(2)(C)(i) of the Commodity Exchange Act does not apply to transactions entered into by U.S. financial institutions, including insured depository institutions, brokers, dealers, and certain retail foreign exchange dealers. *See* 7 U.S.C. 2(c)(2)(C)(i)(I)(aa). To apply this definitional prong to such banking entities, the definition of derivative includes a transaction ''described in'' section 2(c)(2)(C)(i) of the Commodity Exchange Act. In other words, the use of this phrase is intended to capture any transaction described in section 2(c)(2)(C)(i) without regard to the identity of the counterparty.

[128] *See* 76 FR 29818 (May 23, 2011). For example, the SEC and CFTC have proposed to not include (i) certain insurance products within the definitions of ''swap'' and ''security-based swap'' by regulation and (ii) certain consumer agreements (e.g., agreements to acquire or lease real property or purchase products at a capped price) and commercial agreements (e.g., employment contracts or the purchase of real property, intellectual property, equipment or inventory) by joint interpretation. *See id.* at 29832–34. The Agencies have proposed to define ''derivative'' in the proposed rule by reference to the definition of ''swap'' and ''security-based swap'' under the Federal securities and commodities laws in contemplation of the SEC and CFTC's proposed regulatory and interpretative exclusions; to the extent that such exclusions are not included in any final action taken by the SEC and CFTC, the Agencies will consider whether to state such exclusions expressly within the proposed rule's definition of derivative.

[129] Examples of excluded identified banking products are deposit accounts, savings accounts, certificates of deposit, or other deposit instruments issued by a bank.

[130] *See* proposed rule § ____.2(q).

alternative definitions would be more appropriate?

Question 54. Is the proposed definition of derivative effective? If not, what alternative definition would be more effective? Should the proposed rule expressly incorporate the definition of ''swap'' and security-based swap'' under the Federal commodities and securities laws? If not, what alternative approach should be taken? Are there transactions included in those incorporated definitions that should not be included in the proposed rule's definition? If so, what transactions and why? Are there transactions excluded from those incorporated definitions that should be included within the proposed rule's definition? If so, what transactions and why?

Question 55. Is the proposed inclusion of foreign exchange forwards and swaps in the definition of derivative effective? If not, why not? On what basis would the Agencies conclude that such transactions are not derivatives? Are these transactions economically or functionally more similar to secured loans or repurchase arrangements than to commodity forwards and swaps? Would there be any unintended consequences to banking entities if such transactions are included in the proposal's definition of derivative? What effect is including foreign exchange swaps and forwards in the definition of derivative likely to have on banking entities, participants in the foreign exchange markets, and the liquidity and efficiency of foreign exchange markets generally? If included within the definition of derivative, should transactions in foreign exchange swaps and forwards be permitted under section 13(d)(1)(J) of the BHC Act? If so, why and on what basis? Please quantify your responses, to the extent feasible.

Question 56. Is the proposed inclusion of any purchase or sale of a nonfinancial commodity for deferred shipment or delivery that is intended to be physically settled in the definition of derivative effective? If not, why not? Would there be any unintended consequences to banking entities if such transactions are included in the proposal's definition of derivative?

Question 57. Is the proposed inclusion of foreign currency transactions described in section 2(c)(2)(C)(i) of the Commodity Exchange Act in the definition of derivative effective? If not, why not? Would there be any unintended consequences to banking entities if such transactions are included in the proposal's definition of derivative?

Question 58. Is the proposed inclusion of commodity transactions described in section 2(c)(2)(D)(i) of the Commodity Exchange Act in the definition of derivative effective? If not, why not? Would there be any unintended consequences to banking entities if such transactions are included in the proposal's definition of derivative?

Question 59. Is the proposed inclusion of any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b)) in the definition of derivative effective? If not, why not? Would there be any unintended consequences to banking entities if such transactions are included in the proposal's definition of derivative?

Question 60. Is the manner in which the proposed definition of derivative excludes any transaction that the CFTC or SEC exclude by joint regulation, interpretation, guidance, or other action from the definition of ''swap'' or ''security-based swap'' effective? If not, what alternative approach would be more appropriate? Should such exclusions be restated in the proposed rule's definition? If so, why?

Question 61. Is the proposed rule's definition of loan appropriate? If not, what alternative definition would be more appropriate? Should the definition of ''loan'' exclude a security? Should other types of traditional banking products be included in the definition of ''loan''? If so, why?

iii. Definition of Other Terms Related to Proprietary Trading

Section __.3(d) of the proposed rule defines a variety of other terms used throughout subpart B of the proposed rule. These definitions are discussed in further detail below in the relevant summary of the separate sections of the proposed rule in which they are used.

The Agencies request comment on the proposed rule's definition of other terms used in subpart B of the proposed rule. In particular, the Agencies request comment on the following questions:

Question 62. Are the proposed rule's definitions of other terms in § __.3(d) appropriate? If not, what alternative definitions would be more appropriate?

Question 63. Is the definition of additional terms for purposes of subpart B of the proposed rule necessary? If so, what terms should be defined? How should those terms be defined?

2. Section __.4: Permitted Underwriting and Market Making-Related Activities

Section __.4 of the proposed rule implements section 13(d)(1)(B) of the BHC Act, which permits banking entities to engage in certain underwriting and market making-related activities, notwithstanding the prohibition on proprietary trading.[131] Section __.4(a) addresses permitted underwriting activities, and § __.4(b) addresses permitted market making-related activities.

a. Permitted Underwriting Activities

Section __.4(a) of the proposed rule permits a banking entity to purchase or sell a covered financial position in connection with the banking entity's underwriting activities to the extent that such activities are designed not to exceed the reasonably expected near-term demands of clients, customers, or counterparties (the ''underwriting exemption''). In order to rely on this exemption, a banking entity's underwriting activities must meet all seven of the criteria listed in § __.4(a)(2). These seven criteria are intended to ensure that any banking entity relying on the underwriting exemption is engaged in *bona fide* underwriting activities, and conducts those activities in a way that is not susceptible to abuse through the taking of speculative, proprietary positions as a part of, or mischaracterized as, underwriting activity.

First, the banking entity must have established the internal compliance program required by subpart D of the proposed rule, as further described below in Part III.D of this **SUPPLEMENTARY INFORMATION**. This requirement is intended to ensure that any banking entity relying on the underwriting exemption has reasonably designed written policies and procedures, internal controls, and independent testing in place to support its compliance with the terms of the exemption.

Second, the covered financial position that is being purchased or sold must be a security. This requirement reflects the common usage and understanding of the term ''underwriting.'' [132]

Third, the transaction must be effected solely in connection with a distribution of securities for which the banking entity is acting as an underwriter. This prong is intended to give effect to the essential element of the underwriting exemption—i.e., that the transaction be in connection with underwriting activity. For these purposes, the proposed rule defines both (i) a distribution of securities and (ii) an underwriter. The definitions of these terms are generally identical to the

[131] *See* 12 U.S.C. 1851(d)(1)(B).

[132] The Agencies note, however, that a derivative or commodity future transaction may be otherwise permitted under another exemption (e.g., the exemptions for market making-related or risk-mitigating hedging activities).

definitions provided for the same terms in the SEC's Regulation M,[133] which governs the activities of underwriters, issuers, selling security holders, and others in connection with offerings of securities under the Exchange Act.[134] The Agencies have proposed to use similar definitions because the meanings of these terms under Regulation M are generally well-understood by market participants and define the scope of underwriting activities in which banking entities typically engage, including underwriting of SEC-registered offerings, underwriting of unregistered distributions, and acting as a placement agent in private placements.

With respect to the definition of distribution, the Agencies note that Regulation M defines a distribution of securities as ''an offering of securities, whether or not subject to registration under the Securities Act that are distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts.'' [135] The manner in which this Regulation M definition distinguishes a distribution of securities from other transactions appears to be relevant in the context of the underwriting exemption and useful to address potential evasion of the general prohibition on proprietary trading, while permitting *bona fide* underwriting activities. Accordingly, in order to qualify as a distribution for purposes of the proposal, as with Regulation M, the offering must meet the two elements—''magnitude'' and ''special selling efforts and selling methods.'' The Agencies have not defined the terms ''magnitude'' and ''special selling efforts and selling methods'' in the proposed rule, but would expect to rely on the same factors considered under Regulation M in assessing these elements. For example, the number of shares to be sold, the percentage of the outstanding shares, public float, and trading volume that those shares represent are all relevant to an assessment of magnitude.[136] In addition, delivering a sales document, such as a prospectus, and conducting road shows are generally indicative of special selling efforts and selling methods.[137] Another indicator of special selling efforts and selling methods is compensation that is greater than that for secondary trades but consistent with underwriting compensation for an offering. Similar to the approach taken under Regulation M, the Agencies note that ''magnitude'' does not imply that a distribution must be large; instead, this factor is a means to distinguish a distribution from ordinary trading, and therefore does not preclude small offerings or private placements from qualifying for the underwriting exemption.

The definition of ''underwriter'' in the proposed rule is generally similar to that under the SEC's Regulation M, except that the proposed rule's definition would also include, within that definition, a person who has an agreement with another underwriter to engage in a distribution of securities for or on behalf of an issuer or selling security holder.[138] Consistent with current practices and the Council study, the Agencies propose to take into consideration the extent to which the banking entity is engaged in the following activities when determining whether a banking entity is acting as an underwriter as part of a distribution of securities:

- Assisting an issuer in capital raising;
- Performing due diligence;
- Advising the issuer on market conditions and assisting in the preparation of a registration statement or other offering documents;
- Purchasing securities from an issuer, a selling security holder, or an underwriter for resale to the public;
- Participating in or organizing a syndicate of investment banks;
- Marketing securities; and
- Transacting to provide a post-issuance secondary market and to facilitate price discovery.

The Agencies note that the precise activities performed by an underwriter may vary depending on the liquidity of the securities being underwritten and the type of distribution being conducted. For example, each factor need not be present in a private placement.

There may be circumstances in which an underwriter would hold securities that it could not sell in the distribution for investment purposes. If the acquisition of such unsold securities were in connection with the underwriting pursuant to the permitted underwriting activities exemption, the underwriter would also be able to dispose of such securities at a later time.[139]

Fourth, to the extent that the transaction involves a security for which a person must generally be a registered securities dealer, municipal securities dealer or government securities dealer in order to underwrite the security, the banking entity must have the appropriate dealer registration (or in the case of a financial institution that is a government securities dealer, has filed notice of that status as required by section 15C(a)(1)(B) of the Exchange Act) or otherwise be exempt from registration or excluded from regulation as a dealer.[140] Similarly, if the banking entity is engaged in the business of a dealer outside the United States in a manner for which no U.S. registration is required, the banking entity must be subject to substantive regulation of its dealing business in the jurisdiction in which the business is located. This requirement is intended to ensure that (i) any underwriting activity conducted in reliance on the exemption is subject to appropriate regulation and (ii) banking entities are not simultaneously characterizing the transaction as underwriting for purposes of the exemption while characterizing it in a different manner for purposes of applicable securities laws.

Fifth, the underwriting activities of the banking entity with respect to the covered financial position must be designed not to exceed the reasonably expected near-term demands of clients, customers and counterparties.[141] This requirement restates the statutory limitation on the underwriting exemption.

Sixth, the underwriting activities of the banking entity must be designed to generate revenues primarily from fees, commissions, underwriting spreads or other income, and not from appreciation in the value of covered financial positions it holds related to such activities or the hedging of such covered financial position.[142] This requirement

[133] 17 CFR 242.100 *et seq.*

[134] *See* proposed rule §§ __.4(a)(3), (4); 17 CFR 242.100(b).

[135] 17 CFR 242.100.

[136] *See* Review of Antimanipulation Regulation of Securities Offering, Exchange Act Release No. 33924 (Apr. 19, 1994), 59 FR 21681, 21684 (Apr. 26, 1994) (''Regulation M Concept Release'').

[137] *See* Regulation M Concept Release, 59 FR at 21684–85.

[138] *See* proposed rule § __.4(a)(4)(ii).

[139] The Agencies note, however, that such sale would have to be made in compliance with other applicable provisions of the Federal securities laws and regulations.

[140] *See* proposed rule § __.4(a)(2)(iv). For example, if a banking entity is a bank engaged in underwriting asset-backed securities for which it would be required to register as a securities dealer but for the exclusion contained in section 3(a)(5)(C)(iii) of the Exchange Act, the proposed rule would not require that banking entity be a registered securities dealer in order to rely on the underwriting exemption for that transaction. The proposed rule does not apply the dealer registration/notice requirement to the underwriting of exempted securities, security-based swaps, commercial paper, bankers acceptances or commercial bills because the underwriting of such instruments does not require registration as a securities dealer under the Exchange Act.

[141] *See* proposed rule § __.4(a)(2)(v).

[142] For these purposes, underwriting spreads would include any ''gross spread'' (i.e., the

Continued

is intended to ensure that activities conducted in reliance on the underwriting exemption demonstrate patterns of revenue generation and profitability consistent with, and related to, the services an underwriter provides to its customers in bringing securities to market, rather than changes in the market value of the securities underwritten.

Seventh, the compensation arrangements of persons performing underwriting activities at the banking entity must be designed not to encourage proprietary risk-taking. Activities for which a banking entity has established a compensation incentive structure that rewards speculation in, and appreciation of, the market value of securities underwritten, rather than success in bringing securities to market for a client, are inconsistent with permitted underwriting activities under the proposed rule. Although a banking entity relying on the underwriting exemption may appropriately take into account revenues resulting from movements in the price of securities that the banking entity underwrites to the extent that such revenues reflect the effectiveness with which personnel have managed underwriting risk, the banking entity should provide compensation incentives that primarily reward client revenues and effective client service, not proprietary risk-taking.

The Agencies request comment on the proposed rule's implementation of the underwriting exemption. In particular, the Agencies request comment on the following questions:

Question 64. Is the proposed rule's implementation of the underwriting exemption effective? If not, what alternative approach would be more effective? For example, should the exemption include other transactions that do not involve a distribution of securities for which the banking entity is acting as underwriter?

Question 65. Are the seven requirements included in the underwriting exemption effective? Is the application of each requirement to potential transactions sufficiently clear? Should any of the requirements be changed or eliminated? Should other requirements be added in order to better provide an exemption that is not susceptible to abuse through the taking of speculative, proprietary positions in the context of, or mischaracterized as, underwriting? Alternatively, are any of the proposed requirements inappropriately restrictive in that they would be inconsistent with the statutory exemption for certain underwriting activities? If so, how?

Question 66. Do underwriters currently have processes in place that would prevent or reduce the likelihood of taking speculative, proprietary positions in the context of, or mischaracterized as, underwriting? If so, what are those processes?

Question 67. Would any of the proposed requirements cause unintended consequences? Would the proposed requirements alter current underwriting practices in any way? Would any of the proposed requirements trigger an unwillingness to engage in underwriting? What impact, if any, would the proposed exemption have on capital raising? Please explain.

Question 68. What increased costs, if any, would underwriters incur to satisfy the seven proposed requirements of the underwriting exemption? Would underwriters pass the increased costs onto issuers, selling security holders, or their customers in connection with qualifying for the proposed exemption?

Question 69. In addition to the specific activities highlighted above for purposes of evaluating whether a banking entity is acting as an underwriter as part of distribution of securities (e.g., assisting an issuer in capital raising, performing due diligence, etc), are there other or alternative activities that should be considered? Please explain.

Question 70. Should the requirement that a covered financial position be a security be expanded to include other financial instruments? If so, why? How are such other instruments underwritten within the meaning of section 13(d)(1)(B) of the BHC Act?

Question 71. Is the proposed definition of a ''distribution'' of securities appropriate, or over- or under-inclusive in this context? Is there any category of underwriting activity that would not be captured by the proposed definition? If so, what are the mechanics of that underwriting activity? Should it be permitted under the proposed rule, and, if so, why? Would an alternative definition better identify offerings intended to be covered by the proposed definition? If so, what alternative definition, and why?

Question 72. Is the proposed definition of ''underwriter'' appropriate, or over- or under-inclusive in this context? Would an alternative definition, such as the statutory definition of ''underwriter'' under the Securities Act, better identify persons intended to be covered by the proposed definition? If so, why?

Question 73. How accurately can a banking entity engaging in underwriting predict the near-term demands of clients, customers, and counterparties with respect to an offering? How can principal risk that is retained in connection with underwriting activities to support near-term client demand be distinguished from positions taken for speculative purposes?

Question 74. Is the requirement that the underwriting activities of a banking entity relying on the underwriting exemption be designed to generate revenues primarily from fees, commissions, underwriting spreads or similar income effective? If not, how should the requirement be changed? Does the requirement appropriately capture the type and nature of revenues typically generated by underwriting activities? Is any further clarification or additional guidance necessary?

Question 75. Is the requirement that the compensation arrangements of persons performing underwriting activities at a banking entity be designed not to reward proprietary risk-taking effective? If not, how should the requirement be changed? Are there other types of compensation incentives that should be clearly referenced as consistent, or inconsistent, with permitted underwriting activity? Are there specific and identifiable characteristics of compensation arrangements that clearly incentivize prohibited proprietary trading?

Question 76. Are there other types of underwriting activities that should also be included within the scope of the underwriting exemption? If so, what additional activities and why? How would an exemption for such additional activities be consistent with the language and purpose of section 13 of the BHC Act? What criteria, requirements, or restrictions would be appropriate to include with respect to such additional activities to prevent misuse or evasion of the prohibition on proprietary trading?

Question 77. Does the proposed underwriting exemption appropriately accommodate private placements? If not, what changes are necessary to do so?

Question 78. The creation, offer and sale of certain structured securities such as trust preferred securities or tender option bonds, among others, may involve the purchase of another security and repackaging of that security through an intermediate entity. Should the sale of the security by a banking entity to an intermediate entity as part of the creation of the structured security be

difference between the price an underwriter sells securities to the public and the price it purchases them from the issuer) designed to compensate the underwriter for its services.

permitted under one of the exemptions to the prohibition on proprietary trading currently included in the proposed rule (e.g., underwriting or market making)? Why or why not? For purposes of determining whether an exemption is available under these circumstances, should gain on sale resulting from the sale of the purchased security to the intermediate entity as part of the creation of the structured security be considered a relevant factor? Why or why not? What other factors should be considered in connection with the creation of the structured securities and why? Would the analysis be different if the banking entity acquired and retained the security to be sold to the intermediate entity as part of the creation of the structured securities as part of its underwriting of the underlying security? Why or why not?

Question 79. We seek comment on the application of the proposed exemption to a banking entity retaining a portion of an underwriting. Please discuss whether or not firms frequently retain securities in connection with a distribution in which the firm is acting as underwriter. Please identify the types of offerings in which this may be done (e.g., fixed income offerings, securitized products, etc.). Please identify and discuss any circumstances which can contribute to the decision regarding whether or not to retain a portion of an offering. Please describe the treatment of retained securities (e.g., the time period of retention, the type of account in which securities are retained, the potential disposition of the securities). Please discuss whether or not the retention is documented and, if so, how. Should the Agencies require disclosure of securities retained in connection with underwritings? Should the Agencies require specific documentation to demonstrate that the retained portion is connected to an underwriting pursuant to the proposed rule? If so, what kind of documentation should be required? Please discuss how you believe retention should be addressed under the proposal.

b. Permitted Market Making-Related Activities

Section __.4(b) of the proposed rule permits a banking entity to purchase or sell a covered financial position in connection with the banking entity's market making-related activities (the ''market-making exemption'').

i. Approach to Implementing the Exemption for Market Making-Related Activities.

As the Council study noted, implementing the statutory exception for permitted market making-related activities requires a regulatory regime that differentiates permitted market making-related activity, and in particular the taking of principal positions in the course of making a market in particular financial instruments, from prohibited proprietary trading. Although the purpose and function of these two activities are markedly different—market making-related activities provide intermediation and liquidity services to customers, while proprietary trading involves the generation of profit through speculative risk-taking—clearly distinguishing these activities may be difficult in practice. Market making-related activities, like prohibited proprietary trading, sometimes require the taking of positions as principal, and the amount of principal risk that must be assumed by a market maker varies considerably by asset class and differing market conditions.[143] It may be difficult to distinguish principal positions that appropriately support market making-related activities from positions taken for short-term, speculative purposes. In particular, it may be difficult to determine whether principal risk has been retained because (i) the retention of such risk is necessary to provide intermediation and liquidity services for a relevant financial instrument or (ii) the position is part of a speculative trading strategy designed to realize profits from price movements in retained principal risk.[144]

In order to address these complexities, the Agencies have proposed a multi-faceted approach that draws on several key elements. First, similar to the underwriting exemption, the proposed rule includes a number of criteria that a banking entity's activities must meet in order to rely on the exemption for market making-related activities. These criteria are intended to ensure that the banking entity is engaged in *bona fide* market making. As described in greater detail in Part III.D of the Supplementary Information, among these criteria is the requirement that the banking entity have in place a programmatic compliance regime to guide its compliance with section 13 of the BHC Act and the proposed rule. This compliance regime includes requirements that a banking entity have effective policies, procedures, and internal controls that are designed to ensure that prohibited proprietary trading positions are not taken under the guise of permitted market making-related activity. Second, as described in greater detail in Part III.B.5 of this Supplementary Information, Appendix B of the proposed rule contains a detailed commentary regarding how the Agencies propose to identify permitted market making-related activities. This commentary includes six principles the Agencies propose to use as a guide to help distinguish market-making related activities from prohibited proprietary trading. Third, also as described in greater detail in Part III.B.5 of this Supplementary Information, § __.7 and Appendix A of the proposed rule require a banking entity with significant covered trading activities to report certain quantitative measurements for each of its trading units.[145] These quantitative measurements are intended to assist both banking entities and the Agencies in assessing whether the quantitative profile of a trading unit (e.g., the types of revenues it generates and the risks it retains) is consistent with permitted market making-related activities under the proposed rule.

The proposal's multi-faceted approach is intended, through the incorporation of multiple regulatory and supervisory tools, to strike an appropriate balance in implementing the market-making exemption in a way that articulates the scope of permitted activities and meaningfully addresses the potential for misuse of the exemption, while not unduly constraining the important liquidity and intermediation services that market makers provide to their customers and to the capital markets at large.

The Agencies request comment on the proposed rule's approach to implementing the exemption for permitted market making-related activities. In particular, the Agencies request comment on the following questions:

Question 80. Is the proposed rule's approach to implementing the exemption for permitted market making-related activities (i) appropriate and (ii) likely to be effective? If not, what

[143] With respect to certain kinds of market making-related activities, such as market making in securities, these principal positions are often referred to as ''inventory'' or ''inventory positions.'' However, since certain types of market making-related activities, such as market making in derivatives, involve the retention of principal positions arising out of multiple derivatives transactions in particular risks (e.g., retained principal interest rate risk), rather than retention of actual financial instruments, the broader term ''principal positions'' is used in this discussion.

[144] The Council study contains a detailed discussion of the challenges involved in delineating prohibited proprietary trading from permitted market making-related activities. *See* Council study at 15–18.

[145] The definition of ''trading unit'' for this purpose is discussed in detail in Part III.B.5 of this Supplementary Information.

alternative approach would be more appropriate or effective?

Question 81. Does the proposed multi-faceted approach appropriately take into account and address the challenges associated with differentiating prohibited proprietary trading from permitted market making-related activities? Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 82. Does the proposed multi-faceted approach provide banking entities and market participants with sufficient clarity regarding what constitutes permitted market making-related activities? If not, how could greater clarity be provided?

Question 83. What impact will the proposed multi-faceted approach have on the market making-related services that a banking entity provides to its customers? How will the proposed approach impact market participants who use the services of market makers? How will the approach impact the capital markets at large, and in particular the liquidity, efficiency and price transparency of capital markets? If any of these impacts are positive, how can they be amplified? If any of these impacts are negative, how can they be mitigated? Would the proposed rule's prohibition on proprietary trading and exemption for market making-related activity reduce incentives or opportunities for banking entities to trade against customers, as opposed to trading on behalf of customers? If so, please discuss the benefits arising from such reduced incentives or opportunities.

Question 84. What burden will the proposed multi-faceted approach have on banking entities, their customers, and other market participants? How can any burden be minimized or eliminated in a manner consistent with the language and purpose of the statute?

Question 85. Are there particular asset classes that raise special concerns in the context of market making-related activity that should be considered in connection with the proposed market-making exemption? If so, what asset class(es) and concern(s), and how should the concerns be addressed in the proposed exemption?

Question 86. Are there other market making-related activities that the rule text should more clearly permit? Why or why not?

ii. Required Criteria for Permitted Market Making-Related Activities

As part of the proposal's multi-faceted approach to implementing the exemption for permitted market making-related activities, § __.4(b)(2) of the proposed rule specifies seven criteria that a banking entity's market making-related activities must meet in order to rely on the exemption, each of which are described in detail below. These criteria are designed to ensure that any banking entity relying on the exemption is engaged in *bona fide* market making-related activities and conducts those activities in a way that is not susceptible to abuse through the taking of speculative, proprietary positions as a part of, or mischaracterized as, market making-related activity.

First Criterion—Establishment of Internal Compliance Program

Section __.4(b)(2)(i) of the proposed rule requires a banking entity to establish a comprehensive compliance program to monitor and control its market making-related activities. Subpart D of the proposed rule further describes the appropriate elements of an effective compliance program. This criterion is intended to ensure that any banking entity relying on the market-making exemption has reasonably designed written policies and procedures, internal controls, and independent testing in place to support its compliance with the terms of the exemption.

Second Criterion—Bona Fide Market Making

Section __.4(b)(2)(ii) of the proposed rule articulates the core element of the statutory exemption, which is that the activity must be market making-related. In order to give effect to this requirement, § ____.4(b)(2)(ii) of the proposed rule requires the trading desk or other organizational unit that purchases or sells a particular covered financial position to hold itself out as being willing to buy and sell, or otherwise enter into long and short positions in, the covered financial position for its own account on a regular or continuous basis. Notably, this criterion requires that a banking entity relying on the exemption with respect to a particular transaction must actually make a market in the covered financial position involved; simply because a banking entity makes a market in one type of covered financial position does not permit it to rely on the market-making exemption for another type of covered financial position.[146] Similarly, the particular trading desk or other organizational unit of the banking entity that is relying on the exemption for a particular type of covered financial position must also be the trading desk or other organizational unit that is actually making the market in that covered financial position; market making in a particular covered financial position by one trading desk of a banking entity does not permit another trading desk of the banking entity to rely on the market-making exemption for that type of covered financial position.

The language used in § __.4(b)(2)(ii) of the proposed rule to describe *bona fide* market making-related activity is similar to the definition of ''market maker'' under section 3(a)(38) of the Exchange Act.[147] The Agencies have proposed to use similar language because the Exchange Act definition is generally well-understood by market participants and is consistent with the scope of *bona fide* market making-related activities in which banking entities typically engage.

In assessing whether a particular trading desk or other organizational unit holds itself out as being willing to buy and sell, or otherwise enter into long and short positions in, a covered financial position for its own account on a regular or continuous basis in liquid markets, the Agencies expect to take an approach similar to that used by the SEC in the context of assessing whether a person is engaging in *bona fide* market making. The precise nature of a market maker's activities often varies depending on the liquidity, trade size, market infrastructure, trading volumes and frequency, and geographic location of the market for any particular covered financial position. In the context of relatively liquid positions, such as equity securities or other exchange-traded instruments, a trading desk or other organizational unit's market making-related activity should generally include:

- Making continuous, two sided quotes and holding oneself out as willing to buy and sell on a continuous basis;
- A pattern of trading that includes both purchases and sales in roughly comparable amounts to provide liquidity;

[146] The Agencies note that a market maker may often make a market in one type of covered financial positions and hedge its activities using different covered financial positions in which it does not make a market. Such hedging transactions would meet the terms of the market-making exemption if the hedging transaction met the requirements of § __.4(b)(3) of the proposed rule.

[147] Section 3(a)(38) of the Exchange Act defines ''market maker'' as ''any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer quotation communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.'' 15 U.S.C. 78c(a)(38).

• Making continuous quotations that are at or near the market on both sides; and

• Providing widely accessible and broadly disseminated quotes.[148]

In less liquid markets, such as over-the-counter markets for debt and equity securities or derivatives, the appropriate indicia of market making-related activities will vary, but should generally include:

• Holding oneself out as willing and available to provide liquidity by providing quotes on a regular (but not necessarily continuous) basis; [149]

• With respect to securities, regularly purchasing covered financial positions from, or selling the positions to, clients, customers, or counterparties in the secondary market; and

• Transaction volumes and risk proportionate to historical customer liquidity and investments needs.[150]

The Agencies would apply these indicia when evaluating when a banking entity is eligible for the market making-related activities exemption, but also recognize that these indicia cannot be applied at all times and under all circumstances because some may be inapplicable to the specific asset class or market in which the market making activity is conducted.

The *bona fide* market making-related activity described in § __.4(b)(2)(ii) of the proposed rule would include block positioning if undertaken by a trading desk or other organizational unit of a banking entity for the purpose of intermediating customer trading.[151] In addition, *bona fide* market making-related activity may include taking positions in securities in anticipation of customer demand, so long as any anticipatory buying or selling activity is reasonable and related to clear, demonstrable trading interest of clients, customers, or counterparties.

Third Criterion—Reasonably Expected Near-Term Demands of Clients, Customers, and Counterparties

Under § __.4(b)(2)(iii) of the proposed rule, the market making-related activities of the trading desk or other organization unit that conducts a transaction in reliance on the market-making exemption must be designed not to exceed the reasonably expected near-term demands of clients, customers, and counterparties. This criterion implements the language in section 13(d)(1)(B) of the BHC Act and is intended to prevent a trading desk relying on the market-making exemption from taking a speculative proprietary position unrelated to customer needs as part of its purported market making-related activities. As described in further detail in Parts III.B.5 and III.D of the Supplementary Information, the proposed rule also includes a programmatic compliance requirement and requires reporting of quantitative measurements for certain banking entities, both of which are designed, in part, to meaningfully circumscribe the principal positions taken as part of market making-related activities to those which are necessary to meet the reasonably expected near-term demands of clients, customers, and counterparties. The Agencies expect that the programmatic compliance requirement and required reporting of quantitative measurements will play an important role in assessing a banking entity's compliance with § __.4(b)(2)(iii)'s requirement. In addition, as described in Part II.B.5 of the Supplementary Information, Appendix B of the proposed rule provides additional, detailed commentary regarding how the Agencies expect a firm relying on the market-making exemption to manage principal positions and how the Agencies propose to assess whether such positions are consistent with market making-related activities under the proposed rule.

In order for a banking entity's expectations regarding near-term customer demand to be considered reasonable, such expectations should be based on more than a simple expectation of future price appreciation and the generic increase in marketplace demand that such price appreciation reflects. Rather, a banking entity's expectation should generally be based on the unique customer base of the banking entity's specific market-making business lines and the near-term demands of those customers based on particular factors beyond a general expectation of price appreciation. To the extent that a trading desk or other organizational unit of a banking entity is engaged wholly or principally in trading that is not in response to, or driven by, customer demands, the Agencies would not expect those activities to qualify under § __.4(b) of the proposed rule, regardless of whether those activities promote price transparency or liquidity. For example, a trading desk or other organizational unit of a banking entity that is engaged wholly or principally in arbitrage trading with non-customers would not meet the terms of the proposed rule's market making exemption. In the case of a market maker engaging in market making in a security that is executed on an organized trading facility or exchange, that market maker's activities are generally consistent with reasonably expected near-term customer demand when such activities involve passively providing liquidity by submitting resting orders that interact with the orders of others in a non-directional or market-neutral trading strategy and the market maker is registered, if the exchange or organized trading facility

[148] The Agencies note that these indicia are generally consistent with the indicia of *bona fide* market making in equity markets articulated by the SEC for purposes of describing the exception to the locate requirement of the SEC's Regulation SHO for market makers engaged in *bona fide* market-making activities. *See* Exchange Act Release No. 58775 (October 14, 2008), 73 FR 61690, 61698–61699 (Oct. 17, 2008); *see also* 17 CFR 242.203(b)(2)(iii).

[149] The frequency of such regular quotations will itself vary; less illiquid markets may involve quotations on a daily or more frequent basis, while highly illiquid markets may trade only by appointment.

[150] The Agencies also note that the CFTC and SEC have identified, in a proposed rule further defining the terms ''swap dealer'' and ''security-based swap dealer'' under the Commodity Exchange Act and Exchange Act, a variety of distinguishing characteristics of swap dealers and security-based swap dealers in the context of derivatives, including that: (i) Dealers tend to accommodate demand for swaps and security-based swaps from other parties; (ii) dealers are generally available to enter into swaps or security-based swaps to facilitate other parties' interest in entering into those instruments; (iii) dealers tend not to request that other parties propose the terms of swaps or security-based swaps, but instead tend to enter into those instruments on their own standard terms or on terms they arrange in response to other parties' interest; and (iv) dealers tend to be able to arrange customized terms for swaps or security-based swaps upon request, or to create new types of swaps or security-based swaps at the dealer's own initiative. *See* 75 FR 80174, 80176 (Dec. 21, 2010).

[151] The definition of ''market maker'' in the Exchange Act includes a dealer acting in the capacity of a block positioner. Although the term ''block positioner'' is not defined in the proposed rule, the Agencies note that the SEC has adopted a definition of ''qualified block positioner'' in the SEC's Rule 3b–8(c) (17 CFR 240.3b–8(c)), which may serve as guidance in determining whether a block positioner engaged in block positioning is engaged in *bona fide* market making-related activities for purposes of § __.4(b)(2)(ii) of the proposed rule. Under the SEC's Rule 3b–8(c), among other things, a qualified block positioner must meet all of the following conditions: (i) Engages in the activity of purchasing long or selling short, from time to time, from or to a customer (other than a partner or a joint venture or other entity in which a partner, the dealer, or a person associated with such dealer participates) a block of stock with a current market value of $200,000 or more in a single transaction, or in several transactions at approximately the same time, from a single source to facilitate a sale or purchase by such customer; (ii) has determined in the exercise of reasonable diligence that the block could not be sold to or purchased from others on equivalent or better terms; and (iii) sells the shares comprising the block as rapidly as possible commensurate with the circumstances. The Agencies note that the rule establishes a minimum dollar value threshold for a block. The size of a block will vary among different asset classes.

registers market makers.[152] However, activities by such a person that primarily takes liquidity on an organized trading facility or exchange, rather than provides liquidity, would not qualify for the market-making exemption under the proposed rule, even if those activities were conducted by a registered market maker.

Fourth Criterion—Registration Under Securities or Commodities Laws

Under § __.4(b)(2)(iv) of the proposed rule, a banking entity relying on the market-making exemption with respect to trading in securities or certain derivatives must be appropriately registered as a dealer, or exempt from registration or excluded from regulation as a dealer, under applicable securities or commodities laws. With respect to a market-making transaction in one or more covered financial positions that are securities, other than exempted securities, security-based swaps, commercial paper, bankers acceptances or commercial bills, for which a person must be a registered securities dealer, municipal securities dealer or government securities dealer in order to deal in the security, the banking entity must have the appropriate dealer registration (or in the case of a financial institution that is a government securities dealer, has filed notice of that status as required by section 15C(a)(1)(B) of the Exchange Act) or otherwise be exempt from registration or excluded from regulation as a dealer.[153] Similarly, with respect to a market-making transaction involving a swap or security-based swap for which a person must generally be a registered swap dealer or security-based swap dealer, respectively, the banking entity must be appropriately registered or otherwise be exempt from registration or excluded from regulation as a swap dealer or security-based swap dealer.[154] If the banking entity is engaged in the business of a securities dealer, swap dealer or security-based swap dealer outside the United States in a manner for which no U.S. registration is required, the banking entity must be subject to substantive regulation of its dealing business in the jurisdiction in which the business is located. This requirement is intended to ensure that (i) any market making-related activity conducted in reliance on the exemption is subject to appropriate regulation and (ii) a banking entity does not simultaneously characterize the transaction as market making-related for purposes of the exemption while characterizing it in a different manner for purposes of applicable securities or commodities laws.

Fifth Criterion—Revenues From Fees, Commissions, Bid/Ask Spreads or Other Similar Income

Under § __.4(b)(2)(v) of the proposed rule, the market making-related activities of the banking entity must be designed to generate revenues primarily from fees, commissions, bid/ask spreads or other income not attributable to appreciation in the value of covered financial positions it holds in trading accounts or the hedging of such positions. This criterion is intended to ensure that activities conducted in reliance on the market-making exemption demonstrate patterns of revenue generation and profitability consistent with, and related to, the intermediation and liquidity services a market maker provides to its customers, rather than changes in the market value of the positions or risks held in inventory. Similar to the requirement that a firm relying on the market-making exemption design its activities not to exceed reasonably expected near-term client, customer, or counterparty demands, the Agencies expect that the programmatic compliance requirement and required reporting of quantitative measurements will play an important role in assessing a banking entity's compliance with § __.4(b)(2)(v)'s requirement. In addition, as described in Part III.B.5 of this Supplementary Information, Appendix B of the proposed rule provides additional, detailed commentary regarding how the Agencies propose to assess whether the types of revenues generated by a banking entity relying on the market-making exemption are consistent with market making-related activities.

Sixth Criterion—Compensation Incentives

Under § __.4(b)(2)(vii) of the proposed rule, the compensation arrangements of persons performing market making-related activities at the banking entity must be designed not to encourage or reward proprietary risk-taking. Activities for which a banking entity has established a compensation incentive structure that rewards speculation in, and appreciation of, the market value of a covered financial position held in inventory, rather than success in providing effective and timely intermediation and liquidity services to customers, are inconsistent with permitted market making-related activities. Although a banking entity relying on the market-making exemption may appropriately take into account revenues resulting from movements in the price of principal positions to the extent that such revenues reflect the effectiveness with which personnel have managed principal risk retained, a banking entity relying on the market-making exemption should provide compensation incentives that primarily reward customer revenues and effective customer service, not proprietary risk-taking. In addition, as described in Part III.B.5 of this Supplementary Information, Appendix B of the proposed rule provides further commentary regarding how the Agencies propose to assess whether the compensation incentives provided to trading personnel performing trading activities in reliance on the market-making exemption are consistent with market making-related activities.

[152] The Agencies emphasize that the status of being a registered market maker is *not*, on its own, a sufficient basis for relying on the exemption for market making-related activity contained in § __.4(b). however, being a registered market maker is required under these circumstances if the applicable exchange or organized trading facility registers market makers. Registration as a market maker generally involves filing a prescribed form with an exchange or organized trading facility, in accordance with its rules and procedures, and complying with the applicable requirements for market makers set forth in the rules of that exchange or organized trading facility. *See, e.g.,* Nasdaq Rule 4612, New York Stock Exchange Rule 104, CBOE Futures Exchange Rule 515, BATS Exchange Rule 11.5.

[153] *See* proposed rule §§ __.4(b)(2)(iv)(A), (D), (E). For example, if a banking entity is a bank engaged in market-making in qualified Canadian government obligations for which it would be required to register as a securities dealer but for the exclusion contained in section 3(a)(5)(C)(i)(I) of the Exchange Act, the proposed rule would not require that banking entity to be a registered securities dealer in order to rely on the market-making exemption for that market-making transaction. Such a bank would, however, be required to file notice that it is a government securities dealer and comply with rules applicable to financial institutions that are government securities dealers. *See* 15 U.S.C. 78c(a)(42)(E); 15 U.S.C. 78*o*–5(a)(1)(B); 17 CFR 400.5(b); 17 CFR 449.1. Similar to the underwriting exemption, the proposed rule does not apply the dealer registration requirement to market making in securities that are exempted securities, commercial paper, bankers acceptances or commercial bills because dealing in such securities does not require registration as securities dealer under the Exchange Act; however, registering as a municipal securities dealer or government securities dealer is required, if applicable.

[154] *See* proposed rule §§ __.4(b)(2)(iv)(B), (C). A banking entity may be required to be a registered securities dealer if it engages in market-making transactions involving security-based swaps with persons that are not eligible contract participants. *See* 15 U.S.C. 78c(a)(5) (the definition of ''dealer'' in section 3(a)(5) of the Exchange Act, 15 U.S.C. 78c(a)(5), generally includes ''any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants), for such person's own account.'').

Seventh Criterion—Consistency With Appendix B Commentary

Under § __.4(b)(2)(vi) of the proposed rule, the market making-related activities of the trading desk or other organizational unit that conducts the purchase or sale are required to be consistent with the commentary provided in Appendix B, which provides guidance that the Agencies propose to apply to help distinguish permitted market making-related activities from prohibited proprietary trading. Appendix B's proposed commentary, which is described in detail below in Part III.B.5 of this Supplementary Information, discusses various factors by which the Agencies propose to distinguish prohibited proprietary trading from permitted market making-related activities (e.g., how and to what extent a market maker hedges the risk of its market-making transactions, including (i) further detail related directly to other criteria in § __.4(b)(2) (e.g., the types of revenues generated by market makers), and (ii) expectations regarding other factors not expressly included in § __.4(b)(2)).

B. Market Making-Related Hedging

Section __.4(b)(3) of the proposed rule provides that certain hedging transactions related to market-making positions and holdings will also be deemed to be made in connection with a banking entity's market making-related activities for purposes of the market-making exemption. In particular, § __.4(b)(3) provides that the purchase or sale of a covered financial position for hedging purposes will qualify for the market-making exemption if it meets two requirements. First, the purchase or sale must be conducted in order to reduce the specific risks to the banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings acquired pursuant to the market-making exemption. Where the purpose of a transaction is to hedge a market making-related position, it would appear to be market making-related activity of the type described in section 13(d)(1)(B) of the BHC Act. Second, the hedging transaction must also meet the criteria specified in the general exemption for risk-mitigating hedging activity for purposes of the proprietary trading prohibition, which is contained in §§ __.5(b) and (c) of the proposed rule and described in detail in Part III.B.3 of this Supplementary Information. Those criteria are intended to clearly define the scope of appropriate risk-mitigating hedging activities, to foreclose reliance on the exemption for prohibited proprietary trading that is conducted in the context of, or mischaracterized as, hedging activity, and to require documentation regarding the hedging purpose of certain transactions that are established at a level of organization that is different than the level of organization establishing or responsible for the underlying risk or risks that are being hedged, which in the context of the market making-related activity would generally be the trading desk.

iii. Request for Comment

The Agencies request comment on the proposed criteria that must be met in order to rely on the market-making exemption. In particular, the Agencies request comment on the following questions (as well as related questions in Part III.B.5 of this Supplementary Information):

Question 87. Are the seven criteria included in the market-making exemption effective? Is the application of each criterion to potential transactions sufficiently clear? Should any of the criteria be changed or eliminated? Should other criteria be added?

Question 88. Is incorporation of concepts from the definition of ''market maker'' under the Exchange Act useful for purposes of section 13 of the BHC Act and consistent with its purposes? If not, what alternative definition would be more useful or more consistent?

Question 89. Is the proposed exemption overly broad or narrow? For example, would it encompass activity that should be considered prohibited proprietary trading under the proposed rule? Alternatively, would it prohibit forms of market making or market making-related activities that are permitted under other rules or regulations?

Question 90. We seek commenter input on the types of banking entities and forms of activities that would not qualify for the proposed market-making exemption but that commenters consider to otherwise be market making. Please discuss the impact of not permitting such activities under the proposed exemption (e.g., the impact on liquidity).

Question 91. Is the requirement that a trading desk or other organizational unit relying on the market-making exemption hold itself out as being willing to buy and sell, or otherwise enter into long and short positions in, the relevant covered financial position for its own account on a regular or continuous basis effective? If not, what alternative would be more effective? Does the proposed requirement appropriately differentiate between market making-related activities in different markets and asset classes? If not, how could such differences be better reflected? Should the requirement be modified to include certain arbitrage trading activities engaged in by market makers that promote liquidity or price transparency, but do not serve customer, client or counterparty demands, within the scope of market making-related activity? If so why? How could such liquidity- or price transparency-promoting activities be meaningfully identified and distinguished from prohibited proprietary trading practices that also may incidentally promote liquidity or price transparency? Do particular markets or instruments, such as the market for exchange-traded funds, raise particular issues that are not adequately or appropriately addressed in the proposal? If so, how could the proposal better address those instruments, markets or market features?

Question 92. Do the proposed indicia of market making in liquid markets accurately reflect the factors that should generally be used to analyze whether a banking entity is engaged in market making-related activities for purposes of section 13 of the BHC Act and the proposed rule? If not, why not? Should any of the proposed factors be eliminated or modified? Should any additional factors be included? Is reliance on the SEC's indicia of *bona fide* market making for purposes of Regulation SHO under the Exchange Act and the equity securities market appropriate in the context of section 13 of the BHC Act and the proposed rule with respect to liquid markets? If not, why not?

Question 93. Do the proposed indicia of market making in illiquid markets accurately reflect the factors that should generally be used to analyze whether a banking entity is engaged in market making-related activities for purposes of section 13 of the BHC Act and the proposed rule? If not, why not? Should any of the proposed factors be eliminated or modified? Should any additional factors be included?

Question 94. How accurately can a banking entity predict the near-term demands of clients, customers, and counterparties? Are there measures that can distinguish the amount of principal risk that should be retained to support such near-term client, customer, or counterparty demand from positions taken for speculative purposes? How is client, customer, or counterparty demand anticipated in connection with market making-related activities, and how does such approach vary by asset class?

Question 95. Is the requirement that a banking entity relying on the market-making exemption be registered as a dealer (or in the case of a financial institution that is a government securities dealer, has filed notice of that status as required by section 15C(a)(1)(B) of the Exchange Act), or exempt from registration or excluded from regulation as a dealer under relevant securities or commodities laws effective? If not, how should the requirement be changed? Does the requirement appropriately take into account the particular registration requirements applicable to dealing in different types of financial instruments? If not, how could it better do so? Does the requirement appropriately take into account the various registration exemptions and exclusions available to certain entities, such as banks, under the securities and commodities laws? If not, how could it better do so?

Question 96. Is the requirement that a trading desk or other organizational unit of a banking entity relying on the market-making exemption be designed to generate revenues primarily from fees, commissions, bid/ask spreads or similar income effective? If not, how should the requirement be changed? Does the requirement appropriately capture the type and nature of revenues typically generated by market making-related activities? Is any further clarification or additional guidance necessary? Can revenues primarily from fees, commissions, bid/ask spreads or similar income be meaningfully separated from other types of revenues?

Question 97. Is the requirement that the compensation arrangements of persons performing market making-related activities at a banking entity not be designed to encourage proprietary risk-taking effective? If not, how should the requirement be changed? Are there other types of compensation incentives that should be clearly referenced as consistent, or inconsistent, with permitted market making-related activity? Are their specific and identifiable characteristics of compensation arrangements that clearly incentivize prohibited proprietary trading?

Question 98. Is the inclusion of market making-related hedging transactions within the market-making exemption effective and appropriate? Are the proposed requirements that certain hedging transactions must meet in order to be considered to have been made in connection with market making-related activity effective and sufficiently clear? If not, what alternative requirements would be more effective and/or clearer? Should any of the proposed requirements be eliminated? If so, which ones, and why?

Question 99. Should the terms ''client,'' ''customer,'' or ''counterparty'' be defined for purposes of the market-making exemption? If so, how should these terms be defined? For example, would an appropriate definition of ''customer'' be: (i) A continuing relationship in which the banking entity provides one or more financial products or services prior to the time of the transaction; (ii) a direct and substantive relationship between the banking entity and a prospective customer prior to the transaction; (iii) a relationship initiated by the banking entity to a prospective customer to induce transactions; or (iv) a relationship initiated by the prospective customer with a view to engaging in transactions?

Question 100. Are there other types of market making-related activities that should also be included within the scope of the market-making exemption? If so, what additional activities and why? How would an exemption for such additional activities be consistent with the language and intent of section 13 of the BHC Act? What criteria, requirements, or restrictions would be appropriate to include with respect to such additional activities? How would such criteria, requirements, or restrictions prevent circumvention or evasion of the prohibition on proprietary trading?

Question 101. Do banking entities currently have processes in place that would prevent or reduce the likelihood of taking speculative, proprietary positions in the context of, or mischaracterized as, market making-related activities? If so, what processes?

3. Section __.5: Permitted Risk-Mitigating Hedging Activities

Section __.5 of the proposed rule permits a banking entity to purchase or sell a covered financial position if the transaction is made in connection with, and related to, individual or aggregated positions, contracts, or other holdings of a banking entity and is designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings (the ''hedging exemption''). This section of the proposed rule implements, in relevant part, section 13(d)(1)(C) of the BHC Act, which provides an exemption from the prohibition on proprietary trading for certain risk-mitigating hedging activities.

a. Approach to Implementing the Hedging Exemption

Like market making-related activities, risk-mitigating hedging activities present certain implementation challenges because of the potential that prohibited proprietary trading could be conducted in the context of, or mischaracterized as, a hedging transaction. This is because it may often be difficult to identify in retrospect whether a banking entity engaged in a particular transaction to manage or eliminate risks arising from related positions, on the one hand, or to profit from price movements related to the hedge position itself, on the other. The intent with which a purported hedge position is acquired may often be difficult to discern in practice.

In light of these complexities, the Agencies have again proposed a multi-faceted approach to implementation. As with the underwriting and market-making exemptions, the Agencies have proposed a set of criteria that must be met in order for a banking entity to rely on the hedging exemption. The proposed criteria are intended to define the scope of permitted risk-mitigating hedging activities and to foreclose reliance on the exemption for prohibited proprietary trading that is conducted in the context of, or mischaracterized as, permitted hedging activity. This includes implementation of the programmatic compliance regime required under subpart D of the proposed rule and, in particular, requires that a banking entity with significant trading activities implement robust, detailed hedging policies and procedures and related internal controls that are designed to prevent prohibited proprietary trading in the context of permitted hedging activity.[155] In particular, a banking entity's compliance regime must include written hedging policies at the trading unit level and clearly articulated trader mandates for each trader to ensure that the decision of when and how to put on a hedge is consistent with such policies and mandates, and not fully left to a trader's discretion.[156] In addition, to address potential supervisory concerns raised by certain types of hedging transactions, § __.5 of the proposed rule also requires a banking entity to document certain hedging transactions at the time the hedge is established. This multi-faceted approach is intended to articulate the Agencies' expectations regarding the scope of permitted risk-

[155] These aspects of the compliance program requirement are described in further detail in Part III.D of this Supplementary Information.

[156] *See, e.g.,* proposed rule Appendix C.II.a.

mitigating hedging activities in a manner that limits potential abuse of the hedging exemption while not unduly constraining the important risk management function that is served by a banking entity's hedging activities.

b. Required Criteria for Permitted Risk-Mitigating Hedging Activitiesm

Section __.5(b) of the proposed rule describes the seven criteria that a banking entity must meet in order to rely on the hedging exemption. First, § __.5(b)(1) of the proposed rule requires the banking entity to have established an internal compliance program, consistent with the requirements of subpart D, that is designed to ensure the banking entity's compliance with the requirements of this paragraph, including reasonably-designed written policies and procedures, internal controls, and independent testing. This criterion is intended to ensure that any banking entity relying on the exemption has appropriate internal control processes in place to support its compliance with the terms of the exemption.

Second, § __.5(b)(2)(i) of the proposed rule requires that a transaction for which a banking entity is relying on the hedging exemption have been made in accordance with written policies, procedures and internal controls established by the banking entity pursuant to subpart D. This criterion would preclude reliance on the hedging exemption if the transaction was inconsistent with a banking entity's own hedging policies and procedures, as such inconsistency would appear to be indicative of prohibited proprietary trading.

Third, § __.5(b)(2)(ii) of the proposed rule requires that the transaction hedge or otherwise mitigate one or more specific risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, basis risk, or similar risks, arising in connection with and related to individual or aggregated positions, contracts, or other holdings of a banking entity. This criterion implements the essential element of the hedging exemption—i.e., that the transaction be risk-mitigating. Notably, and consistent with the statutory reference to mitigating risks of *individual or aggregated* positions, this criterion would include the hedging of risks on a portfolio basis. For example, it would include the hedging of one or more specific risks arising from a portfolio of diverse holdings, such as the hedging of the aggregate risk of one or more trading desks. However, in each case, the Agencies would expect that the transaction or series of transactions being used to hedge is, in the aggregate, demonstrably risk-reducing with respect to the positions, contracts, or other holdings that are being hedged. A banking entity relying on the exemption should be prepared to identify the specific position or portfolio of positions that is being hedged and demonstrate that the hedging transaction is risk-reducing in the aggregate, as measured by appropriate risk management tools.

In addition, this criterion would include a series of hedging transactions designed to hedge movements in the price of a portfolio of positions. For example, a banking entity may need to engage in dynamic hedging, which involves rebalancing its current hedge position(s) based on a change in the portfolio resulting from permissible activities or from a change in the price, or other characteristic, of the individual or aggregated positions, contracts, or other holdings. The Agencies recognize that, in such dynamic hedging, material changes in risk may require a corresponding modification to the banking entity's current hedge positions.[157]

The Agencies also expect that a banking entity relying on the exemption would be able to demonstrate that the banking entity is already exposed to the specific risks being hedged; generally, the purported hedging of risks to which the banking entity is not actually exposed would not meet the terms of the exemption. However, the hedging exemption would be available in certain cases where the hedge is established slightly before the banking entity becomes exposed to the underlying risk if such anticipatory hedging activity: (i) Is consistent with appropriate risk management practices; (ii) otherwise meets the terms of the hedging exemption; and (iii) does not involve the potential for speculative profit. For example, if a banking entity was contractually obligated, or otherwise highly likely, to become exposed to a particular risk and there was a sound risk management rationale for hedging that risk slightly in advance of actual exposure, the hedging transaction would generally be consistent with the requirement described in § __.5(b)(2)(ii) of the proposed rule.

Fourth, § __.5(b)(2)(iii) of the proposed rule requires that the transaction be reasonably correlated, based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks the transaction is intended to hedge or otherwise mitigate. A transaction that is only tangentially related to the risks that it purportedly mitigates would appear to be indicative of prohibited proprietary trading. Importantly, the Agencies have not proposed that a transaction relying on the hedging exemption be *fully* correlated; instead, only *reasonable* correlation is required.[158] The degree of correlation that may be reasonable will vary depending on the underlying risks and the availability of alternative hedging options—risks that can be easily and cost-effectively hedged with extremely high or near-perfect correlation would typically be expected to be so hedged, whereas other risks may be difficult or impossible to hedge with anything greater than partial correlation. Moreover, it is important to consider the fact that trading positions are often subject to a number of different risks, and some risks may be hedged easily and at low cost but may only account for a small proportion of the total risk in the position.[159] More generally, potential correlation levels between asset classes can differ significantly, and analysis of the reasonableness of correlation would depend on the facts and circumstances of the initial position(s), risk(s) created, liquidity of the instrument, and the legitimacy of the hedge. Regardless of the precise degree of correlation, if the predicted performance of a hedge position during the period that the hedge position and the related position are held would result in a banking entity earning appreciably more profits on the hedge position than it stood to lose on the related position, the hedge would appear likely to be a proprietary trade designed to result in profit rather than an exempt hedge position.

Fifth, § __.5(b)(2)(iv) of the proposed rule requires that the hedging transaction not give rise, at the

[157] This corresponding modification to the hedge should also be reasonably correlated to the material changes in risk that are intended to be hedged or otherwise mitigated, as required by proposed rule § __.5(b)(2)(iii).

[158] Although certain accounting standards, such as FASB ASC Topic 815 hedge accounting, address circumstances in which a transaction may be considered a hedge of another transaction, the proposed rule does not refer to or rely on these accounting standards, because such standards (i) are designed for financial statement purposes, not to identify proprietary trading and (ii) change often and are likely to change in the future without consideration of the potential impact on section 13 of the BHC Act.

[159] Interest rate risk in an equity derivative transaction is one example—the hedging of interest rate risk in an equity derivative position may only result in a small reduction in overall risk and interest rates may only exhibit a small correlation with the value of the equity derivative, but the lack of perfect or significant correlation would not impair reliance on the hedging exemption.

inception of the hedge, to significant exposures that are not themselves hedged in a contemporaneous transaction. A transaction that creates significant new risk exposure that is not itself hedged at the same time would appear to be indicative of prohibited proprietary trading. For example, over-hedging, correlation trading, or pairs trading strategies that generate profits through speculative, proprietary risk-taking would fail to meet this criterion. Similarly, a transaction involving a pair of positions that hedge each other with respect to one type of risk exposure, but create or contain a residual risk exposure would, taken together, constitute prohibited proprietary trading and not risk-mitigating hedging if those positions were taken collectively for the purpose of profiting from short-term movements in the effective price of the residual risk exposure. However, the proposal also recognizes that any hedging transaction will inevitably give rise to certain types of new risk, such as counterparty credit risk or basis risk reflecting the differences between the hedge position and the related position; the proposed criterion only prohibits the introduction of additional significant exposures through the hedging transaction. In addition, proposed § __.5(b)(2)(iv) only requires that no new and significant exposures be introduced at the *inception* of the hedge, and not during the entire period that the hedge is maintained, reflecting the fact that new, unanticipated risks can and sometimes do arise out of hedging positions after the hedge is established. The Agencies have proposed to address the appropriate management of risks that arise out of a hedge position after inception through § __.5(b)(2)(v) of the proposed rule.

Sixth, § __.5(b)(2)(v) of the proposed rule requires that any transaction conducted in reliance on the hedging exemption be subject to continuing review, monitoring and management after the hedge position is established. Such review, monitoring, and management must: (i) Be consistent with the banking entity's written hedging policies and procedures; (ii) maintain a reasonable level of correlation, based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks the purchase or sale is intended to hedge or otherwise mitigate; and (iii) mitigate any significant exposure arising out of the hedge after inception. In accordance with a banking entity's written internal hedging policies, procedures, and internal controls, a banking entity should actively review and manage its hedging positions and the risks that may arise out of those positions over time. A banking entity's internal hedging policies should be designed to ensure that hedges remain effective as correlations or other factors change. In particular, a risk-mitigating hedge position typically should be unwound as exposure to the underlying risk is reduced or increased as underlying risk increases, as selective hedging activity would appear to be indicative of prohibited proprietary trading.[160] A banking entity's written internal hedging policies, procedures, and internal controls for monitoring and managing its hedges also should be reasonably designed to prevent the occurrence of such prohibited proprietary trading activity and be reasonably specific about the level of hedging that is expected to be maintained regardless of opportunities for profit associated with over- or under-hedging.

Seventh, § __.5(b)(2)(vi) of the proposed rule requires that the compensation arrangements of persons performing the risk-mitigating hedging activities are designed not to reward proprietary risk-taking. Hedging activities for which a banking entity has established a compensation incentive structure that rewards speculation in, and appreciation of, the market value of a covered financial position, rather than success in reducing risk, are inconsistent with permitted risk-mitigating hedging activities.

c. Documentation Requirement

Section __.5(c) of the proposed rule imposes a documentation requirement on certain types of hedging transactions. Specifically, for any transaction that a banking entity conducts in reliance on the hedging exemption that involves a hedge established at a level of organization that is different than the level of organization establishing the positions, contracts, or other holdings the risks of which the hedging transaction is designed to reduce, the banking entity must, at a minimum, document the risk-mitigating purpose of the transaction and identify the risks of the individual or aggregated positions, contracts, or other holdings of a banking entity that the transaction is designed to reduce.[161] Such documentation must be established at the time the hedging transaction is effected, not after the fact. The Agencies are concerned that hedging transactions established at a different level of organization than the positions being hedged may present or reflect heightened potential for prohibited proprietary trading, as a banking entity may be able, after the fact, to point to a particular, offsetting exposure within its organization after a position is established and characterize that position as a hedge even when, at the time the position was established, it was intended to generate speculative proprietary gains, not mitigate risk. To address this concern, the Agencies have proposed to require a banking entity, when establishing a hedge at a different level of organization than that establishing or responsible for the underlying positions or risks being hedged, to document the hedging purpose of the transaction and risks being hedged so as to establish a contemporaneous, documentary record that will assist the Agencies in assessing the actual reasons for which the position was established.

d. Request for Comment

The Agencies request comment on the proposed implementation of the risk-mitigating hedging exemption with respect to proprietary trading. In particular, the Agencies request comment on the following questions:

Question 102. Is the proposed rule's approach to implementing the hedging exemption effective? If not, what alternative approach would be more effective?

Question 103. Does the proposed multi-faceted approach appropriately take into account and address the challenges associated with differentiating prohibited proprietary trading from permitted hedging activities? Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 104. Does the proposed approach to implementing the hedging exemption provide banking entities and market participants with sufficient clarity regarding what constitutes permitted hedging activities? If not, how could greater clarity be provided?

[160] The Agencies note that in some cases, it may be appropriate for a banking entity to unwind a hedge, even if the underlying risk remains, if the cost of that hedge become uneconomic, better hedging options become available, or the overall risk profile of the banking entity has changed such that no longer hedging the risk is consistent with appropriate risk management practices.

[161] For example, a hedge would be established at a different level of organization of the banking entity if multiple market making desks were exposed to similar risks and, to hedge such risks, a portfolio hedge was established at the direction of a supervisor or risk manager responsible for more than one desk rather than at each of the market making desks that established the initial positions, contracts, or other holdings.

Question 105. What impact will the proposed approach to implementing the hedging exemption have on the hedging and risk management activities of a banking entity and the services it provide to its clients? If any of these impacts are positive, how can they be amplified? If any of these impacts are negative, how can they be mitigated?

Question 106. What burden will the proposed approach to implementing the hedging exemption have on banking entities? How can any burden be minimized or eliminated in a manner consistent with the language and purpose of the statute?

Question 107. Are the criteria included in the hedging exemption effective? Is the application of each criterion to potential transactions sufficiently clear? Should any of the criteria be changed or eliminated? Should other requirements be added?

Question 108. Is the requirement that a transaction hedge or otherwise mitigate one or more specific risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, basis risk, or similar risks, arising in connection with and related to individual or aggregated positions, contracts, or other holdings of a banking entity effective? If not, what requirement would be more effective? Does the proposed approach sufficiently articulate the types of risks that a banking entity typically hedges? Does the proposal sufficiently address application of the hedging exemption to portfolio hedging strategies? If not, how should the proposal be changed?

Question 109. Does the manner in which section __.5 of the proposal would implement the risk-mitigating hedging exemption effectively address transactions that hedge or otherwise mitigate specific risks arising in connection with and related to *aggregated* positions, contracts, or other holdings of a banking entity? Do certain hedging strategies or techniques that involve hedging the risks of aggregated positions (e.g., portfolio hedging) (i) create the potential for abuse of the hedging exemption or (ii) give rise to challenges in determining whether a banking entity is engaged in exempt, risk-mitigating hedging activity or prohibited proprietary trading? If so, what hedging strategies and techniques, and how? Should additional restrictions, conditions, or requirements be placed on the use of the hedging exemption with respect to aggregated positions so as to limit potential abuse of the exemption, assist banking entities and the Agencies in determining compliance with the exemption, or otherwise improve the effectiveness of the rule? If so, what additional restrictions, conditions, or requirements, and why?

Question 110. Is the requirement that the transaction be reasonably correlated to the risk or risks the transaction is intended to hedge or otherwise mitigate effective? If not, how should the requirement be changed? Should some specific level of correlation and/or hedge effectiveness be required? Should the proposal specify in greater detail how correlation should be measured? Should the proposal require hedges to be effective in periods of financial stress? Does the proposal sufficiently reflect differences in levels of correlation among asset classes? If not, how could it better do so?

Question 111. Is the requirement that the transaction not give rise, at the inception of the hedge, to significant exposures that are not themselves hedged in a contemporaneous transaction effective? Does the requirement establish an appropriate range for legitimate hedging while constraining impermissible proprietary trading? Is this requirement sufficiently clear? If not, what alternative would be more effective and/or clearer? Are there types of risk-mitigating hedging activities that may give rise to new and significant exposures that should be permitted under the hedging exemption? If so, what activities? Should the requirement that no significant exposure be introduced be extended for the duration of the hedging position? If so, why?

Question 112. Is the requirement that any transaction conducted in reliance on the hedging exemption be subject to continuing review, monitoring and management after the transaction is established effective? If not, what alternative would be more effective?

Question 113. Is the requirement that the compensation arrangements of persons performing risk-mitigating hedging activities at a banking entity be designed not to reward proprietary risk-taking effective? If not, how should the requirement be changed? Are there other types of compensation incentives that should be clearly referenced as consistent, or inconsistent, with permitted risk-mitigating hedging activity? Are there specific and identifiable characteristics of compensation arrangements that clearly incentivize prohibited proprietary trading?

Question 114. Is the proposed documentation requirement effective? If not, what alternative would be more effective? Are there certain additional types of hedging transactions that should be subject to the documentation requirement? If so, what transactions and why? Should all types of hedging transactions be subject to the documentation requirement? If so, why? Should banking entities be required to document more aspects of a particular transactions (e.g., all of the criteria applicable to § __.5(b) of the proposed rule)? If so, what aspects and why? What burden would the proposed documentation requirement place on banking entities? How might such burden be reduced or eliminated in a manner consistent with the language and purpose of the statute?

Question 115. Aside from the required documentation, do the substantive requirements of the proposed risk-mitigating hedging exemption suggest that additional documentation would be required to achieve compliance with the proposed rule? If so, what burden would this additional documentation requirement place on banking entities? How might such burden be reduced or eliminated in a manner consistent with the language and purpose of the statute?

4. Section __.6: Other Permitted Trading Activities

Section __.6 of the proposed rule permits a banking entity to engage in certain other trading activities described in section 13(d)(1) of the BHC Act. These permitted activities include trading in certain government obligations, trading on behalf of customers, trading by insurance companies, and trading outside of the United States by certain foreign banking entities. Section __.6 of the proposed rule does not contain *all* of the statutory exemptions contained in section 13(d)(1) of the BHC Act. Several of these exemptions appear, either by plain language or by implication, to be intended to apply only to covered fund activities and investments, and so the Agencies have not proposed to include them in the proposed rule's proprietary trading provisions.[162] Those exemptions are referenced in other portions of the proposed rule pertaining to covered funds.

The Agencies request comment on the proposed rule's approach to implementing the exemptions contained in section 13(d)(1) of the BHC Act to the proposed rule's proprietary trading provisions. In particular, the Agencies

[162] In particular, the proposed rule does not apply (i) the exemption in section 13(d)(1)(E) of the BHC Act for SBICs and certain public welfare or qualified rehabilitation investments, or (ii) the exemptions in sections 13(d)(1)(G) and 13(d)(1)(I) of the BHC Act for certain covered funds activities and investments, to the proprietary trading provisions of subpart B.

request comment on the following questions:

Question 116. Is the proposed rule's approach of identifying which of the statutory exemptions contained in section 13(d)(1) of the BHC Act apply to the proposed rule's proprietary trading provisions effective and/or consistent with the language and purpose of the statute? If not, what alternative would be more effective and/or consistent with the language and purpose of the statute?

Question 117. Are there statutory exemptions that should apply to the proposed rule's proprietary trading provisions that were not included? If so, what exemptions and why?

Question 118. Are there statutory exemptions that were included in the proposed rule's proprietary trading provisions that should not have been included? If so, what exemptions and why?

a. Permitted Trading in Government Obligations

Section __.6(a) of the proposed rule, which implements section 13(d)(1)(A) of the BHC Act,[163] permits the purchase or sale of a covered financial position that is: (i) An obligation of the United States or any agency thereof; [164] (ii) an obligation, participation, or other instrument of or issued by the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation or a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*); or (iii) an obligation issued by any State or any political subdivision thereof.[165] The proposed rule also clarifies that these obligations include limited as well as general obligations of the relevant government entity. The Agencies note that, consistent with the statutory language, the types of instruments described with respect to the enumerated government-sponsored entities include not only obligations of such entities, but also participations and other instruments of or issued by such entity. This would include, for example, pass-through or participation certificates that are issued and guaranteed by one of these government-sponsored entities (e.g., the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation) in connection with their securitization activities.

The Agencies request comment on the proposed rule's approach to implementing the government obligation exemption. In particular, the Agencies request comment on the following questions:

Question 119. Is the proposed rule's application to trading in government obligations sufficiently clear? Should such obligations expressly include, for example, instruments issued by third parties but insured or guaranteed by an enumerated government entity or otherwise backed by its full faith and credit?

Question 120. Should the Agencies adopt an additional exemption for proprietary trading in State or municipal agency obligations under section 13(d)(1)(J) of the BHC Act? If so, how would such an exemption promote and protect the safety and soundness of banking entities and the financial stability of the United States?

Question 121. Should the Agencies adopt an additional exemption for proprietary trading in options or other derivatives referencing an enumerated government obligation under section 13(d)(1)(J) of the BHC Act? For example, should the Agencies provide an exemption for options or other derivatives with respect to U.S. government debt obligations? If so, how would such an exemption promote and protect the safety and soundness of banking entities and the financial stability of the United States?

Question 122. Should the Agencies adopt an additional exemption for proprietary trading in the obligations of foreign governments and/or international and multinational development banks under section 13(d)(1)(J) of the BHC Act? If so, what types of obligations should be exempt? How would such an exemption promote and protect the safety and soundness of banking entities and the financial stability of the United States?

Question 123. Should the Agencies adopt an additional exemption for proprietary trading in any other type of government obligations under section 13(d)(1)(J) of the BHC Act? If so, how would such an exemption promote and protect the safety and soundness of banking entities and the financial stability of the United States?

Question 124. Are the definitions of ''government security'' and ''municipal security'' in sections 3(a)(42) and 3(a)(29) of the Exchange Act helpful in determining the proper scope of this exemption? If so, please explain their utility and how incorporating such definitions into the exemption would be consistent with the language and purpose of section 13 of the BHC Act.

b. Permitted Trading on Behalf of Customers

Section 13(d)(1)(D) of the BHC Act permits a banking entity to purchase or sell a covered financial position on behalf of customers, notwithstanding the prohibition on proprietary trading. Section __.6(b) of the proposed rule implements this section. Because the statute does not specifically define when a transaction would be conducted ''on behalf of customers,'' the proposed rule identifies three categories of transactions that, while they may involve a banking entity acting as principal for certain purposes, appear to be on behalf of customers within the purpose and meaning of the statute. As proposed, only transactions meeting the terms of these three categories would be considered on behalf of customers for purposes of the exemption.

Section __.6(b)(i) of the proposed rule provides that a purchase or sale of a covered financial position is on behalf of customers if the transaction (i) is conducted by a banking entity acting as investment adviser, commodity trading advisor, trustee, or in a similar fiduciary capacity for a customer and for the account of that customer, and (ii) involves solely covered financial positions of which the banking entity's customer, and not the banking entity or any subsidiary or affiliate of the banking entity, is beneficial owner (including as a result of having long or short exposure under the relevant covered financial position). This category is intended to capture a wide range of trading activity conducted in the context of customer-driven investment or commodity advisory, trust, or fiduciary services, so long as that activity is structured in a way that the customer, and not the banking entity providing those services, benefits from any gains and suffers from any losses on such covered financial positions.[166] A transaction that is

[163] Section 13(d)(1)(A) of the BHC Act permits a banking entity to purchase, sell, acquire or dispose securities and other instruments described in section 13(h)(4) of the BHC Act if those securities or other instruments are specified types of government obligations, notwithstanding the prohibition on proprietary trading. *See* 12 U.S.C. 1851(d)(1)(A).

[164] The Agencies propose that United States ''agencies'' for this purpose will include those agencies described in section 201.108(b) of the Board's Regulation A. *See* 12 CFR 201.108(b). The Agencies also note that the terms of the exemption would encompass the purchase or sale of enumerated government obligations on a forward basis (e.g., in a to-be-announced market).

[165] Consistent with the statutory language, the proposed rule does not extend the government obligations exemption to transactions in obligations of an *agency* of any State or political subdivision thereof.

[166] For example, in the case of a banking entity acting as investment adviser to a registered mutual fund, any trading by the banking entity in its capacity of investment adviser and on behalf of that

structured so as to involve a listed form of relationship but nonetheless allows gains or losses from trading activity to inure to the benefit or detriment of the banking entity would fall outside the scope of this category.

Section __.6(b)(ii) of the proposed rule provides that a transaction is on behalf of customers if the banking entity is acting as riskless principal. These type of transactions are similarly customer-driven and do not expose the banking entity to gains or losses on the value of the traded positions, notwithstanding the fact that the banking entity technically acts as principal. The Agencies note that the proposed language describing riskless principal transactions generally mirrors that used in the Board's Regulation Y, OCC interpretive letters, and the SEC's Rule 3a5–1 under the Exchange Act.[167]

Section __.6(b)(iii) of the proposed rule addresses trading for the separate account of insurance policyholders by a banking entity that is an insurance company. In particular, this part of the proposed rule provides that a purchase or sale of a covered financial position is on behalf of customers if:

- The banking entity is an insurance company engaging in the transaction for a separate account;
- The banking entity is directly engaged in the business of insurance and subject to regulation by a State insurance regulator or foreign insurance regulator; [168]
- The banking entity purchases or sells the covered financial position solely for a separate account established by the insurance company in connection with one or more insurance policies issued by that insurance company;
- All profits and losses arising from the purchase or sale of the covered financial position are allocated to the separate account and inure to the benefit or detriment of the owners of the insurance policies supported by the separate account, and not the banking entity; and
- The purchase or sale is conducted in compliance with, and subject to, the insurance company investment and other laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled.

This category is included within the exemption for transactions on behalf of customers because such insurance-related transactions are generally customer-driven and do not expose the banking entity to gains or losses on the value of separate account assets, even though the banking entity may be treated as the owner of those assets for certain purposes. However, to limit the potential for abuse of the exemption, the proposed rule also includes related requirements designed to ensure that the separate account trading activity is subject to appropriate regulation and supervision under insurance laws and not structured so as to allow gains or losses from trading activity to inure to the benefit or detriment of the banking entity.[169] The proposed rule defines a ''separate account'' as an account established or maintained by a regulated insurance company subject to regulation by a State insurance regulator or foreign insurance regulator under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.[170]

The Agencies request comment on the proposed rule's approach to implementing the exemption for trading on behalf of customers. In particular, the Agencies request comment on the following questions:

Question 125. Is the proposed rule's articulation of three categories of transactions on behalf of customers effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Should any of the categories be eliminated? Should any additional categories be added? Please explain.

Question 126. Is the proposed rule's exemption of certain investment adviser, commodity trading advisor, trustee or similar fiduciary transactions effective? What other types of relationships are or should be captured by the proposed rule's reference to ''similar fiduciary relationships,'' and why? Is application of this part of the exemption to particular transactions sufficiently clear? Should any other specific types of fiduciary or other relationships be specified in the rule? If so, what types and why? What impact will the proposed rule's implementation of the exemption have on the investment adviser, commodity trading advisor, trustee or similar fiduciary activities of banking entities? If such impacts are negative, how could they be mitigated or eliminated in a manner consistent with the purpose and language of the statute?

Question 127. Is the proposed rule's exemption of riskless principal transactions effective? If not, what alternative would be more appropriate? Is the description of qualifying riskless principal activity sufficiently clear? If not, how should it be clarified? Should the riskless principal transaction exemption include a requirement that the banking entity must purchase (or sell) the covered financial position as principal at the same price to satisfy the customer buy (or sell) order, exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee? Why or why not? Should the riskless principal exemption include a requirement with respect to the timeframe in which the principal transaction must be allocated to a riskless principal or customer account? Why or why not?

Question 128. Is the proposed rule's exemption of trading for separate accounts by insurance companies effective? If not, what alternative would be more appropriate? Does the proposed exemption sufficiently address the variety of customer-driven separate account structures typically used? If not, how should it address such structures? Does the proposed exemption sufficiently address the variety of regulatory or supervisory regimes to which insurance companies may be subject?

Question 129. What impact will the proposed rule's implementation of the exemption have on the insurance activities of insurance companies affiliated with banking entities? If such impacts are negative, how could they be mitigated or eliminated in a manner consistent with the purpose and language of the statute?

Question 130. Should the term ''customer'' be defined for purposes of the exemption for transactions on behalf of customers? If so, how should it be defined? For example, would an appropriate definition be (i) a continuing relationship in which the banking entity provides one or more financial products or services prior to the time of the transaction, (ii) a direct and substantive relationship between the banking entity and a prospective customer prior to the transaction, or (iii) a relationship initiated by the banking entity to a prospective customer for purposes of the transaction?

fund would be permitted pursuant to § __.6(b)(i) of the proposed rule, so long as the relevant criteria were met.

[167] *See* 12 CFR 225.28(b)(7)(ii); 17 CFR 240.3a5–1(b); OCC Interpretive Letter 626 (July 7, 1993).

[168] The proposed rule provides definitions of the terms ''State insurance regulator'' and ''foreign insurance regulator.'' *See* proposed rule §§ __.3(c)(4), (13).

[169] The Agencies would not consider profits to inure to the benefit of the banking entity if the banking entity were solely to receive payment, out of separate account profits, of fees unrelated to the investment performance of the separate account.

[170] *See* proposed rule § __.2(z).

Question 131. Is the exemption for trading on behalf of customers in the proposed rule over- or under-inclusive? If it is under-inclusive, please discuss any additional activities that should qualify as trading on behalf of customers under the rule. What are the mechanics of the particular trading activity and how does it qualify as being on behalf of customers? Are there certain requirements or restrictions that should be placed on the activity, if permitted by the rule, to prevent evasion of the prohibition on proprietary trading? How would permitting the activity be consistent with the purpose and language of section 13 of the BHC Act? If the proposed exemption is over-inclusive, please explain what aspect of the proposed exemption does not involve trading on behalf of customers within the language and purpose of the statute.

c. Permitted Trading by a Regulated Insurance Company

Section __.6(c) of the proposed rule implements section 13(d)(1)(F) of the BHC Act,[171] which permits a banking entity to purchase or sell a covered financial position if the banking entity is a regulated insurance company acting for its general account or an affiliate of an insurance company acting for the insurance company's general account, subject to certain conditions. Section __.6(d) of the proposed rule generally restates the statutory requirements of the exemption, which provide that:

- The insurance company must directly engage in the business of insurance and be subject to regulation by a State insurance regulator or foreign insurance regulator;
- The insurance company or its affiliate must purchase or sell the covered financial position solely for the general account of the insurance company;
- The purchase or sale must be conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and
- The appropriate Federal banking agencies, after consultation with the Council and the relevant insurance commissioners of the States, must not have jointly determined, after notice and comment, that a particular law, regulation, or written guidance described above is insufficient to protect the safety and soundness of the banking entity or of the financial stability of the United States.[172]

The proposed rule defines a ''general account'' as all of the assets of the insurance company that are not legally segregated and allocated to separate accounts under applicable State law.[173]

The Agencies request comment on the proposed rule's approach to implementing the exemption for general account trading by insurance companies. In particular, the Agencies request comment on the following questions:

Question 132. Should any of the statutory requirements for the exemption be further clarified in the proposed rule? If so, how? Should any additional requirements be added? If so, what requirements and why?

Question 133. Does the proposed rule appropriately and clearly define a general account for these purposes? If not, what alternative definition would be more appropriate?

Question 134. For purposes of the exemption, are the insurance company investment laws, regulations, and written guidance of any particular State or jurisdiction insufficient to protect the safety and soundness of the banking entity, or of the financial stability of the United States? If so, why?

Question 135. What impact will the proposed rule's implementation of the exemption have on the insurance activities of insurance companies affiliated with banking entities? If such impacts are negative, how could they be mitigated or eliminated in a manner consistent with the purpose and language of the statute?

d. Permitted Trading Outside of the United States

Section __.6(d) of the proposed rule implements section 13(d)(1)(H) of the BHC Act,[174] which permits certain foreign banking entities to engage in proprietary trading that occurs solely outside of the United States.[175] This statutory exemption limits the extraterritorial application of the prohibition on proprietary trading to the foreign activities of foreign firms, while preserving national treatment and competitive equality among U.S. and foreign firms within the United States. Consistent with the statute, the proposed rule defines both the type of foreign banking entities that are eligible for the exemption and the circumstances in which proprietary trading by such an entity will be considered to have occurred solely outside of the United States.

i. Foreign Banking Entities Eligible for the Exemption

Section __.6(d)(1)(i) of the proposed rule provides that, in order to be eligible for the foreign trading exemption, the banking entity must not be directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States. This requirement limits the scope of the exemption to banking entities that are organized under foreign law and controlled only by entities organized under foreign law. Consistent with the statutory language, a banking entity organized under the laws of the United States or any State and the subsidiaries and branches of such banking entity (wherever organized or licensed) may not rely on the exemption.[176] Similarly, a U.S. subsidiary or branch of a foreign banking entity would not qualify for the exemption.

Section __.6(d)(1)(ii) of the proposed rule incorporates the statutory requirement that the banking entity must also conduct the transaction pursuant to sections 4(c)(9) or 4(c)(13) of the BHC Act. Section __.6(d)(2) clarifies when a banking entity would meet that requirement, the criteria for which vary depending on whether or not the banking entity is a foreign banking organization.[177]

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[171] *See* 12 U.S.C. 1851(d)(1)(F).

[172] The Federal banking agencies have not proposed at this time to determine, as part of the proposed rule, that the insurance company investment laws, regulations, and written guidance of any particular State or jurisdiction are insufficient to protect the safety and soundness of the banking entity, or of the financial stability of the United States. The Federal banking agencies expect to monitor, in conjunction with the Federal Insurance Office established under section 502 of the Dodd-Frank Act, the insurance company investment laws, regulations, and written guidance of States or jurisdictions to which exempt transactions are subject and make such determinations in the future, where appropriate.

[173] *See* proposed rule § __.3(c)(6).

[174] Section 13(d)(1)(H) of the BHC Act permits a banking entity to engage in proprietary trading, notwithstanding the prohibition on proprietary trading, if it is conducted by a banking entity pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act and the trading occurs solely outside of the United States and the banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States. *See* 12 U.S.C. 1851(d)(1)(H).

[175] This section's discussion of the concept ''solely outside of the United States'' is provided solely for purposes of the proposed rule's implementation of section 13(d)(1)(H) of the BHC Act, and does not affect a banking entity's obligation to comply with additional or different requirements under applicable securities, banking, or other laws.

[176] Under the proposal, a ''State'' means any State, territory or possession of the United States, and the District of Columbia. *See* proposed rule § __.2(aa).

[177] Section __.6(d)(2) only addresses when a transaction will be considered to have been conducted pursuant to section 4(c)(9) of the BHC

Section 4(c)(9) of the BHC Act provides that the restrictions on interests in nonbanking organizations contained in that statute do not apply to the ownership of shares held or activities conducted by any company organized under the laws of a foreign country the greater part of whose business is conducted outside the United States, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the exemption would not be substantially at variance with the purposes of the BHC Act and would be in the public interest.[178] The Board has implemented section 4(c)(9) as part of subpart B of the Board's Regulation K,[179] which specifies a number of conditions and requirements that a foreign banking organization must meet in order to use such authority. Such conditions and requirements include, for example, a qualifying foreign banking organization test that requires the foreign banking organization to demonstrate that more than half of its worldwide business is banking and that more than half of its banking business is outside the United States. The proposed rule makes clear that if a banking entity is a foreign banking organization, it will qualify for the foreign trading exemption if the entity is a qualifying foreign banking organization that conducts the transaction in compliance with subpart B of the Board's Regulation K, and the transaction occurs solely outside of the United States.

Section 13 of the BHC Act also applies to foreign companies that control a U.S. insured depository institution but are not currently subject to the BHC Act generally or to the Board's Regulation K—for example, because the foreign company controls a savings association or an FDIC-insured industrial loan company. Accordingly, the proposed rule also clarifies when this type of foreign banking entity would be considered to have conducted a transaction ''pursuant to section 4(c)(9)'' for purposes of the foreign trading exemption.[180] In particular, the draft rule proposes that to qualify for the foreign trading exemption, such firms must meet at least two of three requirements that evaluate the extent to which the foreign entity's business is conducted outside the United States, as measured by assets, revenues, and income. This test largely mirrors the qualifying foreign banking organization test that is made applicable under section 4(c)(9) of the BHC Act and § 211.23(a) of the Board's Regulation K, except that the test does not also require such a foreign entity to demonstrate that more than half of its banking business is outside the United States.[181]

ii. Trading Solely Outside of the United States

The proposed rule also clarifies when a transaction will be considered to have occurred solely outside of the United States for purposes of the exemption. In interpreting this aspect of the statutory language, the proposal focuses on the extent to which material elements of the transaction occur within, or are conducted by personnel within, the United States. This focus seeks to avoid extraterritorial application of the prohibition of proprietary trading outside the United States while preserving competitive parity within U.S. markets. The proposed rule does not evaluate solely whether the risk of the transaction or management or decision-making with respect to the transaction rests outside the United States, as such an approach would appear to permit foreign banking entities to structure transactions so as to be ''outside of the United States'' for risk and booking purposes while engaging in transactions within U.S. markets that are prohibited for U.S. banking entities.

In particular, § __.6(d)(3) of the proposed rule provides that a transaction will be considered to have occurred solely outside of the United States only if four conditions are met:

- The transaction is conducted by a banking entity that is not organized under the laws of the United States or of one or more States;
- No party to the transaction is a resident of the United States;
- No personnel of the banking entity that is directly involved in the transaction is physically located in the United States; [182] and
- The transaction is executed wholly outside the United States.

These four criteria are intended to ensure that a transaction executed in reliance on the exemption does not involve U.S. counterparties, U.S. trading personnel, U.S. execution facilities, or risks retained in the United States. The presence of any of these factors would appear to constitute a sufficient locus of activity in the U.S. marketplace so as to preclude availability of the exemption.

A resident of the United States is defined in § __.2(t) of the proposed rule, and includes: (i) Any natural person resident in the United States; (ii) any partnership, corporation or other business entity organized or incorporated under the laws of the United States or any State; (iii) any estate of which any executor or administrator is a resident of the United States; (iv) any trust of which any trustee, beneficiary or, if the trust is revocable, settlor is a resident of the United States; (v) any agency or branch of a foreign entity located in the United States; (vi) any discretionary or non-discretionary account or similar account (other than an estate or trust) held by a dealer or fiduciary for the benefit or account of a resident of the United States; (vii) any discretionary account or similar account (other than an estate or trust) held by a dealer or fiduciary organized or incorporated in the United States, or (if an individual) a resident of the United States; or (viii) any partnership or corporation organized or incorporated under the laws of any foreign jurisdiction formed by or for a resident of the United States principally for the purpose of engaging in one or more transactions described in § __.6(d)(1) or § __.13(c)(1) of the proposed rule.[183] The proposed definition is designed to capture the scope of U.S. counterparties, decision-makers and personnel that, if involved in the transaction, would preclude that transaction from being considered to have occurred solely outside the United States. The Agencies note that the proposed definition is similar but not identical to the definition of ''U.S. person'' for purposes of the SEC's Regulation S, which governs securities offerings and sales outside of the United

Act. Although the statute also references section 4(c)(13) of the BHC Act, the Board has applied the authority contained in that section solely to the foreign activities of U.S. banking organizations which, by the express terms of section 13(d)(1)(H) of the BHC Act, are unable to rely on the foreign trading exemption.

[178] *See* 12 U.S.C. 1843(c)(9).

[179] *See* 12 CFR 211.20 *et seq.*

[180] The Board emphasizes that this clarification would be applicable solely in the context of section 13(d)(1) of the BHC Act. The application of section 4(c)(9) to foreign companies in other contexts is likely to involve different legal and policy issues and may therefore merit different approaches.

[181] *See* 12 U.S.C. 1843(c)(9); 12 CFR 211.23(a); proposed rule § __.6(d)(2). This difference reflects the fact that foreign entities subject to section 13 of the BHC Act, but not the BHC Act generally, are likely to be, in many cases, predominantly commercial firms. A requirement that such firms also demonstrate that more than half of their banking business is outside the United States would likely make the exemption unavailable to such firms and subject their global activities to the prohibition on proprietary trading, a result that the statute does not appear to have intended.

[182] Personnel directly involved in the transaction would generally not include persons performing purely administrative, clerical, or ministerial functions.

[183] *See* proposed rule § __.2(t).

States that are not registered under the Securities Act.[184]

iii. Request for Comment

The Agencies request comment on the proposed rule's approach to implementing the foreign trading exemption. In particular, the Agencies request comment on the following questions:

Question 136. Is the proposed rule's implementation of the foreign trading exemption effectively delineated? If not, what alternative would be more effective and/or clearer?

Question 137. Are the proposed rule's provisions regarding when an activity will be considered to have been conducted pursuant to section 4(c)(9) of the BHC Act effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Do those provisions effectively address the application of the foreign trading exemption to foreign banking entities not subject to the BHC Act generally? If not, how should the proposed rule apply the exemption?

Question 138. Are the proposed rule's provisions regarding when an activity will be considered to have occurred solely outside the United States effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Should any requirements be modified or removed? If so, which requirements and why? Should additional requirements be added? If so, what requirements and why?

Question 139. Is the proposed rule's definition of ''resident of the United States'' effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Is the definition over- or under-inclusive? If so, why? Should the definition more closely track, or incorporate by reference, the definition of ''U.S. person'' under the SEC's Regulation S under the Securities Act? If so, why?

Question 140. Does the proposed rule effectively define a resident of the United States for these purposes? If not, how should the definition be altered?

Question 141. Should the Agencies use the authority provided in section 13(d)(1)(J) of the BHC Act to allow U.S.-controlled banking entities to engage in proprietary trading pursuant to section 4(c)(13) of the BHC Act outside of the United States under certain circumstances? If so, under what circumstances should this be permitted and how would such activity promote and protect the safety and soundness of banking entities and the financial stability of the United States?

e. Discretionary Exemptions for Proprietary Trading Under Section 13(d)(1)(J) of the BHC Act

Section 13(d)(1)(J) of the BHC Act permits the Agencies to grant, by rule, other exemptions from the prohibition on proprietary trading if the Agencies determine that the exemption would promote and protect the safety and soundness of the banking entity and the financial stability of the United States.[185] The Agencies have not, at this time, proposed any such discretionary exemptions with respect to the prohibition on proprietary trading. The Agencies request comment as follows:

Question 142. Should the Agencies adopt any exemption from the prohibition on proprietary trading under section 13(d)(1)(J) of the BHC Act? If so, what exemption and why? How would such an exemption promote and protect the safety and soundness of banking entities and the financial stability of the United States?

5. Section __.7: Reporting and Recordkeeping Requirements Applicable to Trading Activities

Section __.7 of the proposed rule, which implements in part section 13(e)(1) of the BHC Act,[186] requires certain banking entities to comply with the reporting and recordkeeping requirements specified in Appendix A of the proposed rule. In addition, § __.7 requires banking entities to comply with the recordkeeping requirements in § __.20 of the proposed rule, related to the banking entity's compliance program,[187] as well as any other reporting or recordkeeping requirements that the relevant Agency may impose to evaluate the banking entity's compliance with the proposed rule.[188] Proposed Appendix A requires a banking entity with significant trading activities to furnish periodic reports to the relevant Agency regarding various quantitative measurements of its trading activities and create and retain records documenting the preparation and content of these reports. The measurements vary depending on the scope, type, and size of trading activities. In addition, proposed Appendix B contains a detailed commentary regarding the characteristics of permitted market making-related activities and how such activities may be distinguished from trading activities that, even if conducted in the context of a banking entity's market-making operations, would constitute prohibited proprietary trading.

A banking entity must comply with proposed Appendix A's reporting and recordkeeping requirements only if it has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion.[189] The Agencies have not proposed to extend the reporting and recordkeeping requirements to banking entities with smaller amounts of trading activity, as it appears that the more limited benefits of applying these requirements to such banking entities, whose trading activities are typically small, less complex, and easier to supervise, would not justify the burden associated with complying with the reporting and recordkeeping requirements.

a. General Approach to Reporting and Recordkeeping Requirements

The reporting and recordkeeping requirements of § __.7 and Appendix A of the proposed rule are an important part of the proposed rule's multi-faceted approach to implementing the prohibition on proprietary trading. These requirements are intended, in particular, to address some of the difficulties associated with (i) identifying permitted market making-related activities and distinguishing such activities from prohibited proprietary trading and (ii) identifying certain trading activities resulting in material exposure to high-risk assets or high-risk trading strategies. To do so, the proposed rule requires certain

[184] *See* 17 CFR 230.902(k).

[185] *See* 12 U.S.C. 1851(d)(1)(J). In addition to permitting the Agencies to provide additional exemptions from the prohibition on proprietary trading, section 13(d)(1)(J) also states that the Agencies may provide additional exemptions from the prohibition on investing in or sponsoring a covered fund, as discussed in Part III.C.5 of this Supplementary Information.

[186] Section 13(e)(1) of the BHC Act requires the Agencies to issue regulations regarding internal controls and recordkeeping to ensure compliance with section 13. *See* 12 U.S.C. 1851(e)(1). Section __.20 and Appendix C of the proposed rule also implement section 13(e)(1) of the BHC Act.

[187] *See* Supplementary Information, Part III.D.

[188] *See* proposed rule § __.7.

[189] *See* proposed rule § __.7(a). The Agencies note that this $1 billion trading asset and liability threshold is the same standard that is used in the Market Risk Capital Rules for determining which bank holding companies and insured depository institutions must calculate their risk-based capital requirements for trading positions under those rules. These banking entities maintain large and complex portfolios of trading assets and are therefore the most likely to be engaged in the types of trading activities that will require significant oversight of compliance with the restrictions on proprietary trading.

banking entities to calculate and report detailed quantitative measurements of their trading activity, by trading unit. These measurements will help banking entities and the Agencies in assessing whether such trading activity is consistent with permitted trading activities in scope, type and profile. The quantitative measurements that must be reported under the proposed rule are generally designed to reflect, and to provide meaningful information regarding, certain characteristics of trading activities that appear to be particularly useful in differentiating permitted market making-related activities from prohibited proprietary trading. For example, the proposed quantitative measurements measure the size and type of revenues generated, and the types of risks taken, by a trading unit. Each of these measurements appears to be useful in assessing whether a trading unit is (i) engaged in permitted market making-related activity or (ii) materially exposed to high-risk assets or high-risk trading strategies. Similarly, the proposed quantitative measurements also measure how much revenue is generated per such unit of risk, the volatility of a trading unit's profitability, and the extent to which a trading unit trades with customers. Each of those characteristics appears to be useful in assessing whether a trading unit is engaged in permitted market making-related activity.

However, the Agencies recognize that no single quantitative measurement or combination of measurements can accurately identify prohibited proprietary trading without further analysis of the context, facts, and circumstances of the trading activity. In addition, certain quantitative measurements may be useful for assessing one type of trading activity, but not helpful in assessing another type of trading activity. As a result, the Agencies propose to use a variety of quantitative measurements to help identify transactions or activities that warrant more in-depth analysis or review.

To be effective, this approach requires identification of useful quantitative measurements as well as judgment regarding the type of measurement results that suggest a further review of the trading unit's activity is warranted. The Agencies intend to take a heuristic approach to implementation in this area that recognizes that quantitative measurements can only be usefully identified and employed after a process of substantial public comment, practical experience, and revision. In particular, the Agencies note that, although a variety of quantitative measurements have traditionally been used by market participants and others to manage the risks associated with trading activities, these quantitative tools have not been developed, nor have they previously been utilized, for the explicit purpose of identifying trading activity that warrants additional scrutiny in differentiating prohibited proprietary trading from permitted market making-related activities. Additional study and analysis will be required before quantitative measurements may be effectively designed and employed for that purpose.

Consistent with this heuristic approach, the proposed rule includes a large number of potential quantitative measurements on which public comment is sought, many of which overlap to some degree in terms of their informational value. Not all of these quantitative measurements may ultimately be adopted, depending on their relative strengths, weaknesses, costs, and benefits. The Agencies note that some of the proposed quantitative measurements may not be relevant to all types of trading activities or may provide only limited benefits, relative to cost, when applied to certain types of trading activities. In addition, certain quantitative measurements may be difficult or impracticable to calculate for a specific covered trading activity due to differences between asset classes, market structure, or other factors. The Agencies have therefore requested comment on a large number of issues related to the relevance, practicability, costs, and benefits of the quantitative measurements proposed. The Agencies also seek comment on whether the quantitative measurements described in the proposal may be appropriate to use in assessing compliance with section 13 of the BHC Act.

In addition to the proposed quantitative measurements, a banking entity may itself develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and the proposed rule and to establish, maintain, and enforce an effective compliance program, as required by § __.20 of the proposed rule and Appendix C. The Agencies note that the proposed quantitative measurements in Appendix A are intended to assist banking entities and Agencies in monitoring compliance with the proprietary trading restrictions and, thus, are related to the compliance program requirements in § __.20 of the proposed rule and proposed Appendix C. Nevertheless, implementation of the proposed quantitative measurements under Appendix A would not necessarily provide all the data necessary for the banking entity to establish an effective compliance program, and a banking entity may need to develop and implement additional quantitative measurements. The Agencies recognize that appropriate and effective quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading unit, including types of instruments traded, trading activities and strategies, and history and experience (e.g., whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure the activities are within risk tolerances established by the banking entity, and to monitor for compliance with the proprietary trading restrictions in the proposed rule.

To the extent that data regarding measurements, as set forth in the proposed rule, are collected, the Agencies propose to utilize the automatic two-year conformance period provided in section 13 of the BHC Act to carefully review that data, further study the design and utility of these measurements, and if necessary, propose changes to the reporting requirements as the Agencies believe are needed to ensure that these measurements are as effective as possible.[190] This heuristic, gradual approach to implementing reporting requirements for quantitative measurements would be intended to ensure that the requirements are formulated in a manner that maximizes their utility for identifying trading activity that warrants additional scrutiny in assessing compliance with the prohibition on proprietary trading, while limiting the risk that the use of quantitative measurements could inadvertently curtail permissible market making-related activities that provide an important service to market participants and the capital markets at large.

In addition, the Agencies request comment on the use of numerical thresholds for certain quantitative

[190] Section 13(c)(2) of the BHC Act provides banking entities two years from the date that the proposed rule becomes effective (with the possibility of up to three, one-year extensions) to bring their activities, investments, and relationships into compliance with section 13, including the prohibition on proprietary trading. *See* 12 U.S.C. 1851(c)(2).

measurements that, if reported by a banking entity, would require the banking entity to review its trading activities for compliance and summarize that review to the relevant Agency. The Agencies have not proposed specific numerical thresholds in the proposal because substantial public comment and analysis would be beneficial prior to formulating and proposing specific numerical thresholds. Instead, the Agencies intend to carefully consider public comments that are provided on this issue and to separately determine whether it would be appropriate to propose, subsequent to finalizing the current proposal, such numerical thresholds.

The Agencies request comment on the proposed approach to implementing reporting requirements for proprietary trading. In particular, the Agencies request comment on the following questions:

Question 143. Is the use of the proposed reporting requirements as part of the multi-faceted approach to implementing the prohibition on proprietary trading appropriate? Why or why not?

Question 144. Is the proposed gradual approach to implementing reporting requirements effective? If not, what approach would be more effective? For example, should the Agencies defer reporting of quantitative measurements until banking entities have developed and refined their compliance programs through the supervision and examination process? What would be the costs and benefits of such an approach?

Question 145. What role, if any, could or should the Office of Financial Research (''OFR'') play in receiving and analyzing banking entities' reported quantitative measurements? Should reporting to the OFR be required instead of reporting to the relevant Agency, and would such reporting be consistent with the composition and purpose of OFR? In the alternative, should reporting to either (i) only the relevant Agency (or Agencies) or (ii) both the relevant Agency (or Agencies) and OFR be required? If so, why? What are the potential costs and benefits of reporting quantitative measurements to the OFR? Please explain.

Question 146. Is there an alternative manner in which the Agencies should develop and propose the reporting requirements for quantitative measurements? If so, how should they do so?

Question 147. Does the proposed approach provide sufficient time for the development and implementation of effective reporting requirements? If not, what alternative approach would be preferable?

Question 148. Should a trading unit be permitted not to furnish a quantitative measurement otherwise required under Appendix A if it can demonstrate that the measurement is not, as applied to that unit, calculable or useful in achieving the purposes of the Appendix with respect to the trading unit's covered trading activities? How might a banking entity make such a demonstration?

Question 149. Is the manner in which the Agencies propose to utilize the conformance period for review of collected data and refinement of the reporting requirements effective? If not, what process would be more effective?

Question 150. Is the proposed $1 billion trading asset and liability threshold, which is also currently used in the Market Risk Capital Rules for purposes of identifying which banks and bank holdings companies must comply with those rules, an appropriate standard for triggering the reporting and recordkeeping requirements of the proposed rule? Why or why not? If not, what alternative standard would be a better benchmark for triggering the reporting and recordkeeping requirements?

Question 151. What are the typical trading activities (e.g., market making-related activities) of a banking entity with less than $1 billion in gross trading assets and liabilities? How complex are those trading activities?

Question 152. Should the proposed $1 billion trading and asset liability threshold used for triggering the reporting and recordkeeping requirements adjust each time the thresholds for complying with the Market Risk Capital Rules adjust, or otherwise be adjusted over time? If not, how and when should the numerical threshold be adjusted?

Question 153. Should all banking entities be required to comply with the reporting and recordkeeping requirements set forth in Appendix A in order to better protect against prohibited proprietary trading, rather than only those banking entities that meet the proposed $1 billion trading asset and liability threshold? Why or why not?

Question 154. Should banking entities that fall under the proposed $1 billion trading asset and liability threshold be required to comply with the reporting and recordkeeping provisions for a pilot period in order to help inform judgment regarding the levels of quantitative measurements at such entities and the appropriate frequency and scope of examination by the relevant Agency for such banking entities? Why or why not?

b. Proposed Appendix A—Purpose and Definitions

Section I of proposed Appendix A describes the purpose of the appendix, which is to specify reporting requirements that are intended to assist banking entities that are engaged in significant trading activities and the Agencies in identifying trading activities that warrant further review or examination to verify compliance with the proprietary trading restrictions, including whether an otherwise-permitted activity under §§ __.4 through __.6(a) of the proposed rule is consistent with the requirement that such activity not result, directly or indirectly, in a material exposure by the banking entity to high-risk assets and high-risk trading strategies. In particular, section I provides that the purpose of the appendix is to assist the relevant Agency and banking entities in:

- Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;
- Monitoring the banking entity's covered trading activities;
- Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;
- Evaluating whether the trading activities of trading units engaged in market making-related activities under § __.4(b) of the proposed rule are consistent with the requirements governing permitted market making-related activities;
- Evaluating whether the trading activities of trading units that are engaged in permitted trading activity under §§ __.4, __.5, or __.6(a) of the proposed rule (e.g., permitted underwriting, market making-related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure by the banking entity to high-risk assets and high-risk trading strategies;
- Identifying the profile of particular trading activities of the banking entity, and the individual trading units of the banking entity, to help establish the appropriate frequency and scope of examination by the relevant Agency of such activities; and
- Assessing and addressing the risks associated with the banking entity's trading activities.

The types of trading and market making-related activities in which banking entities engage is often highly

complex, and any quantitative measurement is capable of producing both ''false negatives'' and ''false positives'' that suggest that prohibited proprietary trading is occurring when it is not, or vice versa. Recognizing this, section I of proposed Appendix A makes clear that the quantitative measurements that may be required to be reported would *not* be intended to serve as a dispositive tool for identifying permissible or impermissible activities.

Section II of proposed Appendix A defines relevant terms used in the appendix. These include certain definitions that clarify how and when certain calculations must be made, as well as a definition of ''trading unit'' that governs the level of organization at which a banking entity must calculate quantitative measurements. The proposed definition of ''trading unit'' covers multiple organizational levels of a banking entity, including:

- Each discrete unit engaged in the coordinated implementation of a revenue generation strategy that participates in the execution of any covered trading activity; [191]
- Each organizational unit used to structure and control the aggregate risk-taking activities and employees of one or more trading units described above;
- All trading operations, collectively; and
- Any other unit of organization specified by the relevant Agency with respect to a particular banking entity.[192]

[191] As noted in Appendix A, the Agencies expect that this would generally be the smallest unit of organization used by the banking entity to structure and control its risk-taking activities and employees, and would include each unit generally understood to be a single ''trading desk.'' For example, if a banking entity has one set of employees engaged in market making-related activities in the equities of U.S. non-financial corporations, and another set of employees engaged in market making-related activities in the equities of U.S. financial corporations, the two sets of employees would appear to be part of a single trading unit if both sets of employees structure and control their trading activities together, making and executing highly coordinated decisions about required risk levels, inventory levels, sources of revenue growth and similar features. On the other hand, if the risk decisions and revenue strategies are considered and executed separately by the two sets of employees, with only loose coordination, they would appear to be two distinct trading units. In determining whether a set of employees constitute a single trading unit, important factors would likely include whether compensation is strongly linked to the group's performance, whether risk levels and trading limits are managed and set jointly or separately, and whether trades are booked together or separately.

[192] This latter prong of the definition has been included to ensure that the Agencies have the ability to require banking entities to report quantitative measurements in other ways to prevent a banking entity from organizing its trading operations so as to undermine the effectiveness of the reporting requirement.

The definition of ''trading unit'' is intended to capture multiple layers of a banking entity's organization structure, including individual trading desks, intermediate divisions that oversee a variety of trading desks, and all trading operations in the aggregate. As described below, under the proposal, the quantitative measurements specified in section IV of proposed Appendix A must be calculated and reported for each such ''trading unit.'' Accordingly, the definition of trading unit is purposefully broad and captures multiple levels of organization so as to ensure that quantitative measurements provide meaningful information, at both a granular and aggregate level, to help banking entities and the Agencies evaluate the quantitative profile of trading operations in a variety of contexts.

The Agencies expect that the scope and nature of trading units to which the quantitative measurements are applied would have an important impact on the informational content and utility of the resulting measurements. Applying a quantitative measurement to a trading unit at a level that aggregates a variety of distinct trading activities may obscure or ''smooth'' differences between distinct lines of business, asset categories and risk management processes in a way that renders the measurement relatively uninformative, because it does not adequately reflect the specific characteristics of the trading activities being conducted. Similarly, applying a quantitative measurement to a trading unit at a highly granular level could, if it captured only a narrow portion of activity that is conducted as part of a broader business strategy, introduce meaningless ''noise'' into the measure or result in a measurement that is idiosyncratic in nature. This highly granular application could render the measurement relatively uninformative because it would not accurately reflect the entirety of the trading activities being conducted. In order to address the potential weaknesses of applying the quantitative measurements at an aggregate and a granular level, respectively, the proposal requires reporting at both levels. The informational inputs required to calculate any particular quantitative measurement at either level are the same. Consequently, it is expected that, depending on the nature of the systems of a particular institution, there may be little, if any, incremental burden associated with calculating and reporting quantitative measurements at multiple levels.

The Agencies request comment on the proposed reporting requirements in Appendix A. In particular, the Agencies request comment on the following questions:

Question 155. Are the ways in which the proposed rule would make use of reported quantitative measurements effective? If not, what uses would be more effective? Should the proposed rule instead use quantitative measurements as a dispositive tool for identifying prohibited proprietary trading? If so, what types of quantitative measurements should be employed, what numerical amount would indicate impermissible proprietary trading activity, and why? Should the quantitative measurements play a less prominent role than proposed in identifying prohibited proprietary trading and why?

Question 156. Are the proposed definitions of terms provided in Appendix A effective? If not, how should the definitions be amended?

Question 157. Is the proposed definition of ''trading unit'' effective? Is it sufficiently clear? If not, what alternative definition would be more effective and/or clearer? Should the definition include more or less granular levels of activity? If so, what specific criteria should be used to determine the appropriate level of granularity?

Question 158. If you are a banking entity, how would your trading activity be categorized, in terms of quantity and type, under the proposed definition of trading unit in Appendix A? For each trading unit type, what categories of quantitative measurements (e.g., risk-management measurements) or specific quantitative measurements (e.g., Stressed Value-at-Risk (''Stress VaR'')) are best suited to assist in distinguishing prohibited proprietary trading from permitted trading activity?

Question 159. Is the proposed rule's requirement that quantitative measurements be reported at multiple levels of organization, including for quantitative measurements historically reported on an aggregate basis (e.g., Value-at-Risk (''VaR'') or Stress VaR) appropriate? If not, what alternative would be more effective? What burdens are associated with such a requirement? How might those burdens be reduced or limited? Please quantify your answers, to the extent feasible.

c. Proposed Appendix A—Scope of Required Reporting

Part III of proposed Appendix A defines the scope of the reporting requirements. The proposed rule adopts a tiered approach that requires banking entities with the most extensive trading activities to report the largest number of quantitative measurements, while

banking entities with smaller trading activities have fewer or no reporting requirements. This tiered approach is intended to reflect the heightened compliance risks of banking entities with extensive trading activities and limit the regulatory burden imposed on banking entities with relatively small or no trading activities, which appear to pose significantly less compliance risk.

Banking Entities With Gross Trading Assets and Liabilities of $5 Billion or More

For any banking entity that has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters, equals or exceeds $5 billion, the proposal would require the banking entity to furnish quantitative measurements for all trading units of the banking entity engaged in trading activity subject to §§ __.4, __.5, or __.6(a) of the proposed rule (i.e., permitted underwriting and market making-related activity, risk-mitigated hedging, and trading in certain government obligations). The scope of data to be furnished depends on the activity in which the trading unit is engaged. First, for the trading units of such a banking entity that are engaged in market making-related activity pursuant to § __.4(b) of the proposed rule, proposed Appendix A requires that a banking entity furnish seventeen quantitative measurements.[193] Second, all trading units of such a banking entity engaged in trading activity subject to §§ __.4(a), __.5, or __.6(a) of the proposed rule would be required to report five quantitative measurements designed to measure the general risk and profitability of the trading unit.[194] The Agencies expect that each of these general types of measurements will be useful in assessing the extent to which any permitted trading activity involves exposure to high-risk assets or high-risk trading strategies. These requirements would apply to all type of trading units engaged in underwriting and market making-related activity, risk-mitigated hedging, and trading in certain government obligations. These additional measurements are designed to help evaluate the extent to which the quantitative profile of a trading unit's activities is consistent with permissible market making-related activities.

Banking Entities With Gross Trading Assets and Liabilities Between $1 Billion and $5 Billion

For any banking entity that has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters, equals or exceeds $1 billion but is less than $5 billion, the proposal would require quantitative measurements to be furnished for trading units that are engaged in market making-related activity subject to § __.4(b) of the proposed rule. Trading units of such banking entities that are engaged in market making-related activities must report eight quantitative measurements that are designed to help evaluate the extent to which the quantitative profile of a trading unit's activities is consistent with permissible market making-related activities.[195] The proposal applies a smaller number of measurements to a smaller universe of trading units for this class of banking entities because they are likely to pose lesser compliance risk and fewer supervisory and examination challenges. A less burdensome reporting regime, coupled with other elements of the proposal (e.g., the compliance program requirement), is likely to be equally as effective in ensuring compliance with section 13 of the BHC Act and the proposed rule for banking entities with smaller trading operations.

Frequency of Calculation and Reporting

Section III.B of proposed Appendix A specifies the frequency of required calculation and reporting of quantitative measurements. Under the proposed rule, each required quantitative measurement must be calculated for each trading day. Required quantitative measurements must be reported to the relevant Agency on a monthly basis, within 30 days of the end of the relevant calendar month, or on such other reporting schedule as the relevant Agency may require. Section III.C of proposed Appendix A requires a banking entity to create and retain records documenting the preparation and content of any quantitative measurement furnished by the banking entity, as well as such information as is necessary to permit the relevant Agency to verify the accuracy of such measurements, for a period of 5 years. This would include records for each trade and position.

Question 160. Is the proposed tiered approach to identifying which banking entities and trading units must comply with the reporting requirements effective? If not, what alternative would be more effective? Does the proposal strike the appropriate balance between the potential benefits of the reporting requirements for monitoring and assuring compliance and the potential costs of those reporting requirements? If not, how could that balance be improved? Should the relevant gross trading assets and liabilities threshold for any category be increased or reduced? If so, why?

Question 161. Should the $1 billion and $5 billion gross trading assets and liabilities thresholds used to identify the extent to which a banking entity is required to furnish quantitative measurements be increased or reduced? If so, why? Should the thresholds be indexed in some way to account for fluctuations in capital markets activity over time? If so, what would be an appropriate method of indexation?

Question 162. Is the proposed $5 billion trading asset and liability threshold an appropriate standard for triggering enhanced reporting requirements under the proposed rule? Why or why not? If not, what alternative standard would be a better benchmark for triggering enhanced reporting requirements?

Question 163. Should the proposed $5 billion trading and asset liability threshold used for triggering enhanced reporting requirements under the proposed rule be subject to adjustment over time? If so, how and when should the numerical threshold be adjusted?

Question 164. Is there a different criterion other than gross trading assets and liabilities that would be more appropriate for identifying banking entities that must furnish quantitative measurements? If so, what is the alternative criterion, and why would it be more appropriate? Are worldwide gross trading assets and liabilities the appropriate criterion for foreign-based banking entities? If not, what alternative criterion would be more appropriate, and why?

Question 165. Are the quantitative measurements specified for the various types of banking entities and trading

[193] *See* proposed rule Appendix A.III.A. These seventeen quantitative measurements are discussed further below.

[194] *See* proposed rule Appendix A.III.A. These five quantitative measurements are: (i) Comprehensive Profit and Loss; (ii) Comprehensive Profit and Loss Attribution; (iii) VaR and Stress VaR; (iv) Risk Factor Sensitivities; and (v) Risk and Position Limits. Each of these and other quantitative measurements discussed in proposed Appendix A are discussed in detail below.

[195] *See* proposed rule Appendix A.III.A. These eight quantitative measurements are (i) Comprehensive Profit and Loss; (ii) Comprehensive Profit and Loss Attribution; (iii) Portfolio Profit and Loss; (iv) Fee Income and Expense; (v) Spread Profit and Loss; (vi) VaR; (vii) Volatility of Comprehensive Profit and Loss and Volatility of Portfolio Profit and Loss; and (viii) Comprehensive Profit and Loss to Volatility Ratio and Portfolio Profit and Loss to Volatility Ratio.

units effective? If not, what alternative set of measurements would be more effective? For each type of trading unit, does the proposal strike the appropriate balance between the potential benefits of the reporting requirements for monitoring and assuring compliance and the potential costs of those reporting requirements? If not, how could that balance be improved?

Question 166. Should banking entities with gross trading assets and liabilities between $1 billion and $5 billion also be required to calculate and report some of the quantitative measurements proposed for banking entities meeting the $5 billion threshold for purposes of assessing whether the banking entity's underwriting, market making, risk-mitigating hedging, and trading in certain government obligations activities involve a material exposure to high-risk assets or high-risk trading strategies? If so, which quantitative measurements and why? If not, why not?

Question 167. Is the proposed frequency of reporting effective? If not, what frequency would be more effective? Should the quantitative measurements be required to be reported quarterly, annually, or upon the request of the applicable Agency and why?

d. Proposed Appendix A—Quantitative Measurements

Section IV of proposed Appendix A describes, in detail, the individual quantitative measurements that must be furnished. These measurements are grouped into the following five broad categories, each of which is described in more detail below:

- *Risk-management measurements*—VaR, Stress VaR, VaR Exceedance, Risk Factor Sensitivities, and Risk and Position Limits;
- *Source-of-revenue measurements*—Comprehensive Profit and Loss, Portfolio Profit and Loss, Fee Income and Expense, Spread Profit and Loss, and Comprehensive Profit and Loss Attribution;
- *Revenues-relative-to-risk measurements*—Volatility of Comprehensive Profit and Loss, Volatility of Portfolio Profit and Loss, Comprehensive Profit and Loss to Volatility Ratio, Portfolio Profit and Loss to Volatility Ratio, Unprofitable Trading Days based on Comprehensive Profit and Loss, Unprofitable Trading Days based on Portfolio Profit and Loss, Skewness of Portfolio Profit and Loss, and Kurtosis of Portfolio Profit and Loss;
- *Customer-facing activity measurements*—Inventory Turnover, Inventory Aging, and Customer-facing Trade Ratio; and
- *Payment of fees, commissions, and spreads measurements*—Pay-to-Receive Spread Ratio.

The Agencies have proposed these quantitative measurements because, taken together, these measurements appear useful for understanding the context in which trading activities occur and identifying activities that may warrant additional scrutiny to determine whether these activities involve prohibited proprietary trading because the trading activity either is inconsistent with permitted market making-related activities or presents a material exposure to high-risk assets or high-risk trading strategies. As described below, different quantitative measurements are proposed to identify different aspects and characteristics of trading activity for the purpose of helping to identify prohibited proprietary trading, and the Agencies expect that the quantitative measurements will be most useful for this purpose when implemented and reviewed collectively, rather than in isolation. The Agencies believe that, in the aggregate, many banking entities already collect and review many of these measurements as part of their risk management activities, and expect that many of the quantitative measurements proposed would be readily computed and monitored at the multiple levels of organization that are included in proposed Appendix A's definition of ''trading unit,'' to which they would apply.

The first set of quantitative measurements relates to risk management, and includes VaR, Stress VaR, VaR Exceedance, Risk Factor Sensitivities, and Risk and Position Limits. These measurements are widely used by banking entities to measure and manage trading risks and activities. In the case of VaR, Stress VaR, VaR Exceedance, and Risk Factor Sensitivities, these measures provide internal, model-based assessments of overall risk, stated in terms of large but plausible losses that may occur or changes in revenue that would be expected to result from movements in underlying risk factors. In the case of Risk and Position Limits, the measure provides an explicit assessment of management's expectation of how much risk is required to perform permitted market-making and hedging activities. With the exception of Stress VaR, each of these measurements are routinely used to manage and control risk taking activities, and are also used by some banking entities for purposes of calculating regulatory capital and allocating capital internally. In the context of permitted market making-related activities, these risk management measures are useful in assessing whether the actual risk taken is consistent with the level of principal risk that a banking entity must retain in order to service the near-term demands of customers. Significant, abrupt or inconsistent changes to key risk management measures, such as VaR, that are inconsistent with prior experience, the experience of similarly situated trading units and management's stated expectations for such measures may indicate impermissible proprietary trading. In addition, indicators of unanticipated or unusual levels of risk taken, such as a significant number of VaR Exceedance or breaches of internal Risk and Position Limits, may suggest behavior that is inconsistent with appropriate levels of risk and may warrant further scrutiny.

The second set of quantitative measurements relates to the source of revenues, and includes Comprehensive Profit and Loss, Portfolio Profit and Loss, Fee Income, Spread Profit and Loss, and Comprehensive Profit and Loss Attribution. These measurements are intended to capture the extent, scope, and type of profits and losses generated by trading activities and provide important context for understanding how revenue is generated by trading activities. Because permitted market making-related activities seek to generate profits by providing customers with intermediation and related services while maintaining, and to the extent practicable minimizing, the risks associated with any asset or risk inventory required to meet customer demands, these revenue measurements would appear to provide helpful information to banking entities and the Agencies regarding whether actual revenues are consistent with these expectations. The Agencies note that although banking entities already routinely calculate and analyze the extent and source of revenues derived from their trading activities, calculating the proposed source of revenue measurements according to the specifications described in proposed Appendix A may require banking entities to implement new processes to calculate and furnish the required data.

The third set of measurements relates to realized risks and revenue relative to realized risks, and includes Volatility of Profit and Loss, Comprehensive Profit and Loss to Volatility Ratio and Portfolio Profit and Loss to Volatility Ratio, Unprofitable Trading Days based on Comprehensive Profit and Loss and Unprofitable Trading Days based on

Portfolio Profit and Loss, and Skewness of Portfolio Profit and Loss and Kurtosis of Portfolio Profit and Loss. These measurements are intended to provide banking entities and the Agencies with *ex post,* data-based assessments of risk, as a supplement to internal, model-based assessments of risk, and give further context around the riskiness of underlying trading activities and the profitability of these activities relative to the risks taken. Some of these measurements, such as the skewness and kurtosis measurements, are proposed in order to capture asymmetric, ''fat tail'' risks that (i) are not well captured by simple volatility measures, (ii) may not be well captured by internal risk measurement metrics, such as VaR, and (iii) can be associated with proprietary trading strategies that seek to earn short-term profits by taking exposures to these types of risks. The Agencies expect that these realized-risk and revenue-relative-to-realized-risk measurements would provide information useful in assessing whether trading activities are producing revenues that are consistent, in terms of the degree of risk that is being assumed, with typical market making-related activities. Market making and related activities seek to generate profitability primarily by generating fees, commissions, spreads and other forms of customer revenue that are relatively, though not completely, insensitive to market fluctuations and generally result in a high level of revenue relative to risk over an appropriate time frame. In contrast, proprietary trading strategies seek to generate revenue primarily through favorable changes in asset valuations. The Agencies note that each of the proposed measurements relating to realized risks and revenues relative to realized risks are generally consistent with existing revenue, risk, and volatility data routinely collected by banking entities with large trading operations or are simple, standardized functions of such data.

The fourth set of quantitative measurements relates to customer-facing activity measurements, and includes Inventory Risk Turnover, Inventory Aging, and Customer-facing Trade Ratio. These measurements are intended to provide banking entities and Agencies with meaningful information regarding the extent to which trading activities are directed at servicing the demands of customers. Quantitative measurements such as Inventory Risk Turnover and Inventory Aging assess the extent to which size and volume of trading activity is aimed at servicing customer needs, while the Customer-facing Trade Ratio provides directionally useful information regarding the extent to which trading transactions are conducted with customers. The Agencies expect that these measurements will be useful in assessing whether permitted market making-related activities are focused on servicing customer demands. Although the Agencies understand that banking entities typically measure inventory aging and turnover in the context of cash instruments (e.g., equity and debt securities), they note that applying these measurements, as well as the Customer-facing Trade Ratio generally, would require banking entities to implement new processes to calculate and furnish the related data.

The fifth set of quantitative measurements relates to the payment of fees, commissions, and spreads, and includes the Pay-to-Receive Spread Ratio. This measurement is intended to measure the extent to which trading activities generate *revenues* for providing intermediation services, rather than generate *expenses* paid to other intermediaries for such services. Because market making-related activities ultimately focus on servicing customer demands, they typically generate substantially more fees, spreads and other sources of customer revenue than must be paid to other intermediaries to support customer transactions. Proprietary trading activities, however, that generate almost no customer facing revenue will typically pay a significant amount of fees, spreads and commissions in the execution of trading strategies that are expected to benefit from short-term price movements. Accordingly, the Agencies expect that the proposed Pay-to-Receive Spread Ratio measurement will be useful in assessing whether permitted market making-related activities are primarily generating, rather than paying, fees, spreads and other transactional revenues or expenses. A level of fees, commissions, and spreads paid that is inconsistent with prior experience, the experience of similarly situated trading units and management's stated expectations for such measures could indicate impermissible proprietary trading.

For each individual quantitative measurement, proposed Appendix A describes the measurement, provides general guidance regarding how the measurement should be calculated (where needed) and specifies the period over which each calculation should be made. The proposed quantitative measurements attempt to incorporate, wherever possible, measurements already used by banking entities to manage risks associated with their trading activities. Of the measurements proposed, the Agencies expect that a large majority of measurements proposed are either (i) already routinely calculated by banking entities or (ii) based solely on underlying data that are already routinely calculated by banking entities. However, calculating these measurements according to the specifications described in proposed Appendix A and at the various levels of organization mandated may require banking entities to implement new processes to calculate and furnish the required data.

The extent of the burden associated with calculating and reporting quantitative measurements will likely vary depending on the particular measurements and differences in the sophistication of management information systems at different banking entities. As noted, the proposal tailors these data collections to the size and type of activity conducted by each banking entity in an effort to minimize the burden in particular on firms that engage in few or no trading activities subject to the proposed rule.

The Agencies have also attempted to provide, to the extent possible, a standardized description and general method of calculating each quantitative measurement that, while taking into account the potential variation among trading practices and asset classes, would facilitate reporting of sufficiently uniform information across different banking entities so as to permit horizontal reviews and comparisons of the quantitative profile of trading units across firms.

The Agencies request comment on the proposed quantitative measurements. In particular, the Agencies request comment on the following questions:

Question 168. Are the proposed quantitative measurements appropriate in general? If not, what alternative(s) would be more appropriate, and why? Should certain quantitative measurements be eliminated, and if so, why? Should additional quantitative measurements be added? If so, which measurements and why? How would those additional measurements be described and calculated?

Question 169. How many of the proposed quantitative measurements do banking entities currently utilize? What are the current benefits and costs associated with calculating such quantitative measurements? Would the reporting and recordkeeping requirements proposed in Appendix A for such quantitative measurements impose any significant, additional benefits or costs?

Question 170. Which of the proposed quantitative measurements do banking entities currently not utilize? What are the potential benefits and costs to calculating these quantitative measurements and complying with the proposed reporting and recordkeeping requirements? Please quantify your answers, to the extent feasible.

Question 171. Is the scope and frequency of required reporting appropriate? If not, what alternatives would be more appropriate? What burdens would be associated with reporting quantitative measurements on that basis, and how could those burdens be reduced or eliminated in a manner consistent with the purpose and language of the statute? Please quantify your answers, to the extent feasible.

Question 172. For each of the categories of quantitative measurements (e.g., quantitative measurements relating to risk management), what factors should be considered in order to further refine the proposed category of quantitative measurements to better distinguish prohibited proprietary trading from permitted trading activity? For example, should the timing of a calculation be considered significant in certain contexts (e.g., should specific quantitative measurements be calculated during the middle of a trading day instead of the end of the day)? Please quantify your answers, to the extent feasible.

Question 173. In light of the size, scope, complexity, and risk of covered trading activities, do commenters anticipate the need to hire new staff with particular expertise in order to calculate the required quantitative measurements (e.g., collect data and make computations)? Do commenters anticipate the need to develop additional infrastructure to obtain and retain data necessary to compute the proposed quantitative measurements? Please explain and quantify your answers, to the extent feasible.

Question 174. For each individual quantitative measurement that is proposed:

- Is the use of the quantitative measurement to help distinguish between permitted and prohibited trading activities effective? If not, what alternative would be more effective? Does the quantitative measurement provide any additional information of value relative to other quantitative measurements proposed?
- Is the use of the quantitative measurement to help determine whether an otherwise-permitted trading activity is consistent with the requirement that such activity must not result, directly or indirectly, in a material exposure by the banking entity to high-risk assets and high-risk trading strategies effective? If not, what alternative would be more effective?
- What factors should be considered in order to further refine the proposed quantitative measurement to better distinguish prohibited proprietary trading from permitted trading activity? For example, should the timing of a calculation be considered significant in certain contexts (e.g., should specific quantitative measurements be calculated during the middle of a trading day instead of at the end of the day)?
- If the quantitative measurement is proposed to be applied to a trading unit that is engaged in activity pursuant to §§ __.4(a), __.5, or __.6(a) of the proposed rule, is the quantitative measurement calculable in relation to such activity? Is the quantitative measurement useful for determining whether underwriting, risk-mitigating hedging, or trading in certain government obligations is resulting, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies?
- Is the description of the quantitative measurement sufficiently clear? What alternative would be more appropriate or clearer? Is the description of the quantitative measurement appropriate, or is it overly broad or narrow? If it is overly broad, what additional clarification is needed? Should the Agencies provide this additional clarification in the appendix's description of the quantitative measurement? If the description is overly narrow, how should it be modified to appropriately describe the quantitative measurement, and why?
- Is the general calculation guidance effective and sufficiently clear? If not, what alternative would be more effective or clearer? Is more or less specific calculation guidance necessary? If so, what level of specificity is needed to calculate the quantitative measurement? What are the different calculation options and methodologies that could be used to reach the desired level of specificity? What are the costs and benefits of these different options? If the proposed calculation guidance is not sufficiently specific, how should the calculation guidance be modified to reach the appropriate level of specificity? For example, rather than provide this level of specificity in proposed Appendix A, should the Agencies instead make each banking entity responsible for determining the best method of calculating the quantitative measurement at this level of specificity, based on the banking entity's business and profile, which would then be subject to supervision, review, or examination by the relevant Agency? If the proposed calculation guidance is overly specific, why is it too specific and how should the guidance be modified to reach the appropriate level of specificity?
- Is the general calculation guidance for the measurement consistent with how banking entities currently calculate the quantitative measurement, if they do so? If not, how does the proposed guidance differ from methodology currently used by banking entities? What is the purpose of the current calculation methodology used by banking entities?
- What operational or logistical challenges might be associated with performing the calculation of the quantitative measurement and obtaining any necessary informational inputs?
- Is the quantitative measurement not calculable for any specific type of trading unit? If so, what type of trading unit, and why is the quantitative measurement not calculable for that type of trading unit? Is there an alternative quantitative measurement that would reflect the same trading activity but not pose the same calculation difficulty? Are there particular challenges to documenting that a specific quantitative measurement is not calculable?
- Is the quantitative measurement substantially likely to frequently produce false negatives or false positives that suggest that prohibited proprietary trading is occurring when it is not, or vice versa? If so, why? If so, what alternative quantitative measurement would better help identify prohibited proprietary trading?
- Should the quantitative measurement better account for distinctions among trading activities, trading strategies, and asset classes? If so, how? For example, should the quantitative measurements better account for distinctions between trading activities in cash and derivatives markets? If so, how? Are there any other distinctions for which the quantitative measurements may need to account? If so, what distinctions, and why?
- Does the quantitative measurement provide useful information as applied to all types of trading activities, or only a certain subset of trading activities? If it only provides useful information for a subset of trading activities, how should this issue be addressed? How beneficial is the information that the quantitative measurement provides for this subset of trading activities? Do any of the other quantitative measurements provide the

same level of beneficial information for this subset of trading activities? Should the quantitative measurement be required to be reported for all trading activities, only a relevant subset of trading activities, or not at all?

• Does the quantitative measurement provide useful information as applied to all asset classes, or only a certain subset of asset classes? If it only provides useful information for a subset of asset classes, how should this issue be addressed? How beneficial is the information the quantitative measurement provides for this subset of asset classes? Do any of the other quantitative measurements provide the same level of beneficial information for this subset of asset classes? Should the quantitative measurement be required to be reported for all asset classes, only a relevant subset of asset classes, or not at all?

• Is the calculation period effective and sufficiently clear? If not, what alternative would be more effective or clearer?

• How burdensome and costly would it be to calculate the measurement at the specified calculation frequency and calculation period? Are there any difficulties or costs associated with calculating the measurement for particular trading units? How significant are those potential costs relative to the potential benefits of the measurement in monitoring for impermissible proprietary trading? Are there potential modifications that could be made to the measurement that would reduce the burden or cost? If so, what are those modifications? Please quantify your answers, to the extent feasible.

Question 175. In light of the size, scope, complexity, and risk of covered trading activities, are there certain types of quantitative measurements that will not be appropriate for some types of banking entities, desks, or levels? If so, would it be appropriate to require only certain quantitative measurements for such banking entities, desks, or levels?

Question 176. How might the number of quantitative measurements impact behavior of banking entities? Is there a cost of requiring more quantitative measurements, such as the cost of increased uncertainty regarding the combined results of such quantitative measurements? To what extent and in what ways might uncertainty as to how the quantitative measurements are applied and evaluated impact behavior?

Proposed Appendix B—Commentary Regarding Identification of Permitted Market Making-Related Activities

Proposed Appendix B provides commentary that is intended to assist a banking entity in distinguishing permitted market making-related activities from trading activities that, even if conducted in the context of a banking entity's market making operations, would constitute prohibited proprietary trading. As noted in Part I of proposed Appendix B, the commentary applies to all banking entities that are engaged in market making-related activities in reliance on § __.4(b) of the proposed rule. Part II of proposed Appendix B clarifies that all defined terms used in Appendix B have the meaning given those terms in §§ __.2 and __.3 of the proposed rule and Appendix A.

The commentary regarding identification of permitted market making-related activities, which is contained in Part III of proposed Appendix B, includes three principal components. The first component provides an overview of market making-related activities and describes, in detail, typical practices in which market makers engage and typical characteristics of market making-related activities, articulating the general framework within which the Agencies view market making-related activities.[196] For example, the commentary provides that market making-related activities, in the context of a banking entity acting as principal, generally involve either (i) in the case of market making in a security that is executed on an organized trading facility or exchange, passively providing liquidity by submitting resting orders that interact with the orders of others on an organized trading facility or exchange and acting as a registered market maker, where such exchange or organized trading facility provides the ability to register as a market maker, or (ii) in other cases, providing an intermediation service to its customers by assuming the role of a counterparty that stands ready to buy or sell a position that the customer wishes to sell or buy. The second component of the commentary provides an overview of prohibited proprietary trading activities, which describes the general framework within which the Agencies view prohibited proprietary trading and contrasts that activity to the practices and characteristics of market making-related activities.[197] The third component describes certain challenges that arise in distinguishing permitted market making-related activities and prohibited proprietary trading, particularly in cases in which both of these activities occur within the context of a market making operation,[198] and proposes guidance that the Agencies would apply in distinguishing permitted market making-related activities from prohibited proprietary trading. This guidance includes six factors that would cause a banking entity to be considered, absent explanatory circumstances, to be engaged in prohibited proprietary trading, and not permitted market making-related activity. The six factors are:

• Trading activity in which a trading unit retains risk in excess of the size and type required to provide intermediation services to customers; [199]

• Trading activity in which a trading unit primarily generates revenues from price movements of retained principal positions and risks, rather than customer revenues;

• Trading activity in which a trading unit: (i) Generates only very small or very large amounts of revenue per unit of risk taken; (ii) does not demonstrate consistent profitability; or (iii) demonstrates high earnings volatility;

• Trading activity in which a trading unit either (i) does not transact through a trading system that interacts with orders of others or primarily with customers of the banking entity's market making desk to provide liquidity services, or (ii) holds principal positions in excess of reasonably expected near term customer demands;

• Trading activity in which a trading unit routinely pays rather than earns fees, commissions, or spreads; and

[196] *See* proposed rule Appendix B, § III.A. The practices and characteristics that are described generally reinforce and augment the specific requirements that a banking entity must meet in order to rely on the market-making exemption under § ____.4(b) of the proposed rule.

[197] *See* proposed rule Appendix B, § III.B.

[198] *See* proposed rule Appendix B, § III.C. Proposed Appendix B notes, for example, that it may be difficult to distinguish (i) inventory positions that appropriately support market making-related activities from (ii) positions taken for proprietary purposes. *See id.*

[199] For simplicity and ease of reading, the Agencies have used the term ''customer'' throughout the discussion of market making-related activity. However, as discussed in proposed Appendix B, a market maker's ''customers'' generally vary depending on the asset class and market in which the market maker is providing intermediation services. In the context of market making in a security that is executed on an organized trading facility or an exchange, a ''customer'' is any person on behalf of whom a buy or sell order has been submitted by a broker-dealer or any other market participant. In the context of market making in a covered financial position in an over-the-counter market, a ''customer'' generally would be a market participant that makes use of the market maker's intermediation services, either by requesting such services or entering into a continuing relationship with the market maker with respect to such services. In certain cases, depending on the conventions of the relevant market (e.g., the over-the-counter derivatives market), such a ''customer'' may consider itself or refer to itself more generally as a ''counterparty.''

• The use of compensation incentives for employees of a particular trading activity that primarily reward proprietary risk-taking.[200]

The proposed commentary makes clear that the enumerated factors are subject to certain facts and circumstances that may explain why a trading activity may meet one or more factors but does not involve prohibited proprietary trading, and provides a range of examples of such explanatory facts and circumstances.[201] The Agencies emphasize that these examples are not meant to be exhaustive, as a variety of other circumstances may exist to explain why a particular trading activity, even if meeting one of the factors, may nonetheless be a permitted market making-related activity.[202]

In addition, for each of these six factors, the proposed rule provides general guidance as to (i) the types of facts and circumstances on which the relevant Agency may base any determination that a banking entity's trading activity met the relevant factor and (ii) which quantitative measurements, if furnished by a banking entity pursuant to Appendix A, the relevant Agency would use to help assess the extent to which a banking entity's activities met the relevant factor.

The Agencies request comment on the proposed commentary regarding identification of permitted market making-related activities. In particular, the Agencies request comment on the following questions:

Question 177. Is the overview of permitted market making-related activities and prohibited proprietary trading proposed in Appendix B accurate? If not, what alternative overview would be more accurate? Does the overview appropriately account for differences in market making-related activities across different asset classes? If not, which type of market making-related activity does the overview not sufficiently describe or account for?

Question 178. Is the requirement that a market maker engaged in market making that is executed on an exchange or an organized trading facility must be a registered market maker, provided the relevant exchange or organized trading facility provides the ability to register, appropriate, or is it over- or under-inclusive? Please discuss and provide detailed examples of any such markets where registering as a market maker is not feasible or should not be required for purposes of this rule, and unregistered market makers provide similar services or perform similar functions.

Question 179. With respect to market making that is executed on an exchange or an organized trading facility, what potential impact or unintended consequences might result from limiting the market making exemption to registered market makers when the relevant exchange or organized trading facility registers market makers? Would such a requirement result in any potential decrease in the passive provision of liquidity by the submission of resting orders? Do you anticipate that any such decrease would be exacerbated in times of market stress? If yes, please describe the impact on liquidity and the marketplace in general. Please discuss whether and how any potential decrease in liquidity could be mitigated. In addition, would such a requirement result in additional costs that would be borne by market participants purchasing and selling on an exchange or organized trading facility? Please identify and discuss any other additional costs. Please discuss whether and how any such consequences can be mitigated.

Question 180. In addition to benefits discussed in the Supplementary Information, are there other benefits that would be achieved by requiring that a market maker be registered with respect to market making on an exchange or an organized trading facility? Is there a way to amplify these benefits? Could these benefits be realized through alternative means? If so, how?

Question 181. In addition to registered market makers on exchanges or organized trading facilities, what other classes of liquidity providers exist? Are their obligations and activities similar to, or different than those of registered market makers? If so, how? Are the compensated in a different manner?

Question 182. How much liquidity is provided by registered market makers versus other liquidity providers by asset class (e.g., equities, etc.) with respect to trading on an exchange or an organized trading facility? The Agencies encourage commenters to provide data in support of comments.

Question 183. Is there any specific element of market making-related activity that the overview does not take into account in its description of market making? If so, how should the overview account for this element? Are there any descriptions of market making-related activity in the overview that should not be considered to be market making-related activity? If so, why? Is there any specific element of prohibited proprietary trading activity that the overview does not take into account in its description of prohibited proprietary trading? If so, how should the overview account for this element? Are there any descriptions of prohibited proprietary trading activity in the overview that should not be considered to be prohibited proprietary trading? If so, why?

Question 184. Are each of the six factors specified for helping to distinguish permitted market making-related activity from prohibited proprietary trading appropriate? If not, how should they be changed, and why? Should any factors be eliminated or added? If so, which ones and why? Could any of the proposed factors occur as a result of the banking entity engaging in one of the other permitted activities (e.g., underwriting, trading on behalf of customers)? If so, would the facts and circumstances that the Agencies propose to consider be sufficient to determine and verify that the banking entity is not engaged in prohibited proprietary trading? If not, how should this issue be addressed?

Question 185. Are the facts and circumstances that would be used to determine whether a banking entity's activities satisfy a certain factor appropriate? If not, how should they be changed, and why? Should any be eliminated or added? If so, which ones, and why?

Question 186. Are the identified quantitative measurements that the Agencies would use to help assess a particular factor appropriate? If not, how should they be changed, and why? Should any be eliminated or added? If so, which ones, and why?

f. Incorporation of Numerical Thresholds in the Commentary Regarding Identification of Permitted Market Making-Related Activities

As noted above, the Agencies are currently requesting comment on whether to incorporate, as part of the proposed rule, numerical thresholds for certain quantitative measurements, and if so, how to do so. For example, the proposed rule could include one or more numerical thresholds that, if met by a banking entity, would require the banking entity to review its trading

[200] *See* proposed rule Appendix B, § III.C.1–6. The Agencies note that each of these six criteria is directly related to the overview of market making-related activities provided in section III.A. of proposed Appendix B.

[201] The proposed commentary does not contemplate explanatory facts and circumstances for the compensation incentives factor, given that the choice of compensation incentives provided to trading personnel is under the full control of the banking entity.

[202] The Agencies also note that, although a particular trading activity may not meet the requirements applicable to permitted market making-related activities, it may still be exempt under another available exemption.

activities for compliance and summarize that review to the relevant Agency.

The primary purpose of using some form of threshold would be to provide banking entities with a clear standard regarding trading activity that presented a quantitative profile sufficiently questionable to warrant further review and explanation to the relevant Agency. Such clarity would appear to provide significant benefits both to banking entities in conducting their trading activities in conformance with the proposed rule and to Agencies in monitoring trading activities and obtaining additional, more detailed information in circumstances warranting closer scrutiny. In addition to the benefits of transparency, thresholds would also encourage consistent review by banking entities and the Agencies of transactions, both within a banking entity and across all banking entities. The purpose of such thresholds would not be to serve as bounds of permitted conduct or as a comprehensive, dispositive tool for determining whether prohibited proprietary trading has occurred.

Numerical thresholds have not been included in the proposed rule because the Agencies believe that public comment and further review is warranted before numerical thresholds and specific numerical amounts may be proposed. Instead, the Agencies request comment on whether such thresholds would be desirable and, if so, what particular form such thresholds should take and what specific numerical thresholds would be appropriate. To facilitate the comment process, this request for comment includes a number of illustrative examples of numerical thresholds on which specific comment is sought.

In particular, the Agencies request comment on the following questions:

Question 187. What are the potential benefits and costs of incorporating into the proposed rule one or more numerical thresholds for certain quantitative measurements that, if reported by a banking entity, would require the banking entity to review its trading activities for compliance and summarize that review to the relevant Agency? Would such thresholds provide useful clarity to banking entities and/or market participants regarding the types of trading activities that merit additional scrutiny? Should numerical thresholds be used for any purposes other than highlighting trading activities that should be reviewed, the results of which would be reported to the relevant Agency? If so, for what purpose, and how and why?

Question 188. For which of the relevant quantitative measurements might it be appropriate and effective to include a numerical threshold that would trigger banking entity review and explanation? How should a numerical threshold be formulated, and why? Should a numerical threshold for a single quantitative measurement be applied individually, or should the threshold instead be triggered by exceeding some combination of numerical thresholds for different measurements? For any particular threshold, what numerical amount should be used, and why? How would such numerical amount be consistent with a level at which further review and explanation is warranted? Should the amount vary by asset class or other characteristic? If so, how?

Question 189. For each of the following illustrative examples of potential thresholds, is the threshold formulated effectively? If not, what alternative formulation would be more effective? Should the threshold formulation vary by asset class or other characteristic? If so, how and why? If the threshold was utilized, what actual numerical amount should be specified, and why? How would such numerical amount be consistent with a level at which further review and explanation is warranted? Should the numerical amount vary by asset class or other characteristic? If so, how and why?

- ''If a trading unit reports an increase in VaR, Stress VaR, or Risk Factor Sensitivities greater than [__] over a period of [__] months, or such other threshold as [Agency] may require, the banking entity must (i) promptly review and investigate the trading unit's activities to verify whether the trading unit is operating in compliance with the proprietary trading restrictions and (ii) report to [Agency] a summary of such review, including any explanatory circumstances.''
- ''If a trading unit reports an average Comprehensive Profit and Loss that is less than [__] times greater than the Portfolio Profit and Loss, exclusive of Spread Profit and Loss, for [__] consecutive months, or such other threshold as [Agency] may require, the banking entity must (i) promptly review and investigate the trading unit's activities to verify whether the trading unit is operating in compliance with the proprietary trading restrictions and (ii) report to [Agency] a summary of such review, including any explanatory circumstances.''
- ''If a trading unit reports a Comprehensive Profit and Loss to Volatility Ratio that is less than [__] times greater than that trading desk's Portfolio Profit and Loss to Volatility Ratio over a period of [__] months, or such other threshold as [Agency] may require, the banking entity must (i) promptly review and investigate the trading unit's activities to verify whether the trading unit is operating in compliance with the proprietary trading restrictions and (ii) report to [Agency] a summary of such review, including any explanatory circumstances.''
- ''If a trading unit reports a number of Unprofitable Trading Days Based on Portfolio Profit and Loss that is less than [__] greater than the number of Unprofitable Trading Days Based on Comprehensive Profit and Loss for [__] consecutive months, or such other threshold as [Agency] may require, the banking entity must (i) promptly review and investigate the trading unit's activities to verify whether the trading unit is operating in compliance with the proprietary trading restrictions and (ii) report to [Agency] a summary of such review, including any explanatory circumstances.''
- ''If a trading unit reports a Pay-to-Receive Spread Ratio that is less than [__] over a period of [__] months, or such other threshold as [Agency] may require, the banking entity must (i) promptly review and investigate the trading unit's activities to verify whether the trading unit is operating in compliance with the proprietary trading restrictions and (ii) report to [Agency] a summary of such review, including any explanatory circumstances.''

6. Section __.8: Limitations on Permitted Trading Activities

Section __.8 of the proposed rule implements section 13(d)(2) of the BHC Act, which places certain limitations on the permitted trading activities (e.g., permitted market making-related activities, risk-mitigating hedging, etc.) in which a banking entity may engage.[203] Consistent with the statute, § __.8(a) of the proposed rule provides that no transaction, class of transactions, or activity is permissible under §§ __.4 through __.6 of the proposed rule if the transaction, class of transactions, or activity would:

- Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;
- Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or
- Pose a threat to the safety and soundness of the banking entity or U.S. financial stability.

[203] *See* 12 U.S.C. 1851(d)(2).

The proposed rule further defines ''material conflict of interest,'' ''high-risk asset,'' and ''high-risk trading strategy'' for these purposes.

a. Scope of ''Material Conflict of Interest''

Section __.8(b) of the proposed rule defines the scope of material conflicts of interest which, if arising in connection with a permitted trading activity, are prohibited under the proposal.[204] Conflicts of interest may arise in a variety of circumstances related to permitted trading activities. For example, a banking entity may acquire substantial amounts of nonpublic information about the financial condition of a particular company or issuer through its lending, underwriting, investment advisory or other activities which, if improperly transmitted to and used in trading operations, would permit the banking entity to use such information to its customers', clients' or counterparties' disadvantage. Similarly, a banking entity may conduct a transaction that places the banking entity's own interests ahead of its obligations to its customers, clients or counterparties, or it may seek to gain by treating one customer involved in a transaction more favorably than another customer involved in that transaction. Concerns regarding conflicts of interest are likely to be elevated when a transaction is complex, highly structured or opaque, involves illiquid or hard-to-value instruments or assets, requires the coordination of multiple internal groups (such as multiple trading desks or affiliated entities), or involves a significant asymmetry of information or transactional data among participants.[205] In all cases, the existence of a material conflict of interest depends on the specific facts and circumstances.

To address these types of material conflicts of interest, § __.8(b) of the proposed rule specifies that a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, unless the banking entity has appropriately addressed and mitigated the conflict of interest, where possible, and subject to specific requirements provided in the proposal, through either (i) timely and effective disclosure, or (ii) informational barriers.[206] Unless the conflict of interest is addressed and mitigated in one of the two ways specified in the proposal, the related transaction, class of transactions or activity would be prohibited under the proposed rule, notwithstanding the fact that it may be otherwise permitted under §§ __.4 through __.6 of the proposed rule.[207]

However, while these conflicts may be material for purposes of the proposed rule, the mere fact that the buyer and seller are on opposite sides of a transaction and have differing economic interests would not be deemed a ''material'' conflict of interest with respect to transactions related to *bona fide* underwriting, market making, risk-mitigating hedging or other permitted activities, assuming the activities are conducted in a manner that is consistent with the proposed rule and securities and banking laws and regulations.

Section __.8(b)(1) of the proposed rule describes the two requirements that must be met in cases where a banking entity addresses and mitigates a material conflict of interest through timely and effective disclosure. First, § __.8(b)(1)(i) of the proposed rule requires that the banking entity, *prior* to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, for which a conflict may arise, make clear, timely, and effective disclosure of the conflict or potential conflict of interest, together with any other necessary information.[208] This would also require such disclosure to be provided in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest.[209] Disclosure that is only general or generic, rather than specific to the individual, class, or type of transaction or activity, or that omits details or other information that would be necessary to a reasonable client's, customer's, or counterparty's understanding of the conflict of interest, would not meet this standard. Second, § __.8(b)(1)(ii) of the proposed rule requires that the disclosure be made explicitly and effectively, and in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty that was created or would be created by the conflict or potential conflict.[210]

The Agencies note that, in order to provide the requisite opportunity for the client, customer or counterparty to negate or substantially mitigate the disadvantage created by the conflict, the disclosure would need to be provided sufficiently close in time to the client's, customer's, or counterparty's decision to engage in the transaction or activity to give the client, customer, or counterparty an opportunity to meaningfully evaluate and, if necessary, take steps that would negate or substantially mitigate the conflict. Disclosure provided far in advance of the individual, class, or type of transaction, such that the client, customer, or counterparty is unlikely to take that disclosure into account when evaluating a transaction, would not suffice. Conversely, disclosure provided without a sufficient period of time for the client, customer, or counterparty to evaluate and act on the information it receives, or disclosure provided after the fact, would also not suffice under the proposal. The Agencies note that the proposed definition would not prevent or require disclosure with respect to transactions or activities that align the interests of the banking entity with its clients, customers, or counterparties or that otherwise do not involve ''material'' conflicts of interest as discussed above.

The proposed disclosure standard reflects the fact that some types of conflicts may be appropriately resolved through the disclosure of clear and meaningful information to the client, customer, or counterparty that provides such party with an informed opportunity to consider and negate or substantially mitigate the conflict.

[204] Section __.17(b) of the proposed rule defines the scope of material conflicts of interest which, if arising in connection with permitted covered fund activities, are prohibited.

[205] *See, e.g.,* U.S. Senate Permanent Subcommittee on Investigations, Wall Street and the Financial Crisis: Anatomy of a Financial Collapse (Apr. 13, 2011), *available at http://hsgac.senate.gov/public/_files/Financial_Crisis/FinancialCrisisReport.pdf.*

[206] *See* proposed rule § __.8(b)(1).

[207] The Agencies note that a banking entity subject to Appendix C must implement a compliance program that includes, among other things, policies and procedures that explain how the banking entity monitors and prohibits conflicts of interest with clients, customers, and counterparties. Further, as noted in the discussion of the definition of ''material conflict of interest'' in Part III.B.6 of this Supplemental Information, the discussion of that definition is provided solely for purposes of the proposed rule's definition of material conflict of interest, and does not affect the scope of that term in other contexts or a banking entity's obligation to comply with additional or different requirements with respect to a conflict under applicable securities, banking, or other laws (e.g., section 27B of the Securities Act, which governs conflicts of interest relating to certain securitizations; section 206 of the Investment Advisers Act of 1940, which applies to conflicts of interest between investment advisers and their clients; or 12 CFR 9.12, which applies to conflicts of interest in the context of a national bank's fiduciary activities).

[208] *See* proposed rule § __.8(b)(1)(A).

[209] *See id.*

[210] *See* proposed rule § __.8(b)(1)(B).

However, in the case of a conflict in which a client, customer, or counterparty does not have sufficient information and opportunity to negate or mitigate the materially adverse effect on the client, customer, or counterparty created by the conflict, the existence of that conflict of interest would prevent the banking entity from availing itself of any exemption (e.g., the underwriting or market-making exemptions) with respect to the relevant transaction, class of transactions, or activity. The Agencies note that the proposed disclosure provisions are provided solely for purposes of the proposed rule's definition of material conflict of interest, and do not affect a banking entity's obligation to comply with additional or different disclosure or other requirements with respect to a conflict under applicable securities, banking, or other laws (e.g., section 27B of the Securities Act, which governs conflicts of interest relating to certain securitizations; section 206 of the Investment Advisers Act of 1940, which governs conflicts of interest between investment advisers and their clients; or 12 CFR 9.12, which applies to conflicts of interest in the context of a national bank's fiduciary activities).

Section __.8(b)(2) of the proposed rule describes the requirements that must be met in cases where a banking entity uses information barriers that are reasonably designed to prevent a material conflict of interest from having a materially adverse effect on a client, customer or counterparty. Information barriers can be used to restrict the dissemination of information within a complex organization and to prevent material conflicts by limiting knowledge and coordination of specific business activities among units of the entity. Examples of information barriers include, but are not limited to, restrictions on information sharing, limits on types of trading, and greater separation between various functions of the firm. Information barriers may also require that banking entity units or affiliates have no common officers or employees. Such information barriers have been recognized in Federal securities laws and rules as a means to address or mitigate potential conflicts of interest or other inappropriate activities.[211]

In order to address and mitigate a conflict of interest through the use of the information barriers pursuant to § __.8(b)(2) of the proposed rule, a banking entity would be required to establish, maintain, and enforce information barriers that are memorialized in written policies and procedures, including physical separation of personnel, functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer or counterparty.[212] Importantly, the proposed rule also provides that, notwithstanding a banking entity's establishment of such information barriers, if the banking entity knows or should reasonably know that a material conflict of interest arising out of a specific transaction, class or type of transactions, or activity may involve or result in a materially adverse effect on a client, customer, or counterparty, the banking entity may not rely on those information barriers to address and mitigate any conflict of interest. In such cases, the transaction or activity would be prohibited, unless the banking entity otherwise complies with the requirements of § __.8(b)(1).[213] This aspect of the proposal is intended to make clear that, in specific cases in which a banking entity has established an information barrier but knows or should reasonably know that it has failed or will fail to prevent a conflict of interest arising from a specific transactions or activity that disadvantages a client, customer, or counterparty, the information barrier is insufficient to address that conflict and the transaction would be prohibited, unless the banking entity is otherwise able to address and mitigate the conflict through timely and effective disclosure under the proposal.[214]

The Agencies note that the proposed definition of material conflict of interest does not address instances in which a banking entity has made a material misrepresentation to its client, customer, or counterparty in connection with a transaction, class of transactions, or activity, as such transactions or activity appears to involve fraud rather than a conflict of interest. However, the Agencies note that such misrepresentations are generally illegal under a variety of Federal and State regulatory schemes (e.g., the Federal securities laws). In addition, the Agencies note that any activity involving a material misrepresentation to, or other fraudulent conduct with respect to, a client, customer, or counterparty would not be permitted under the proposed rule in the first instance. For example, a trading activity involving a material misrepresentation to a client, customer, or counterparty would fail, on its face, to satisfy the proposed terms of the underwriting or market-making exemption.

b. Definition of ''High-Risk Asset'' and ''High-Risk Trading Strategy''

Section __.8(c) of the proposed rule defines ''high-risk asset'' and ''high-risk trading strategy'' for proposes of § __.8's proposed limitations on permitted trading activities. Section __.8(c)(1) defines a ''high-risk asset'' as an asset or group of assets that would, if held by the banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would fail. Section __.8(c)(2) defines a ''high-risk trading strategy'' as a trading strategy that would, if engaged in by the banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would fail.[215]

c. Request for Comment

The Agencies request comment on the proposed limitations on permitted trading activities. In particular, the

[211] For example, information barriers have been used in complying with the requirement in section 15(g) of the Exchange Act that registered brokers and dealers establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such broker's or dealer's business, to prevent the misuse of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer.

[212] *See* proposed rule § __.8(b)(2). As part of maintaining and enforcing information barriers, a banking entity should have processes to review, test, and modify information barriers on a continuing basis. In addition, banking entities should have ongoing monitoring to maintain and to enforce information barriers, for example by identifying whether such barriers have not prevented unauthorized information sharing and addressing instances in which the barriers were not effective. This may require both remediating any identified breach as well as updating the information barriers to prevent further breaches, as necessary. Periodic assessment of the effectiveness of information barriers and periodic review of the written policies and procedures are also important to the maintenance and enforcement of effective information barriers and reasonably designed policies and procedures. Such assessments can be done either (i) internally by a qualified employee or (ii) externally by a qualified independent party.

[213] *See* proposed rule § __.8(b)(2).

[214] In addition, if a conflict occurs to the detriment of a client, customer, or counterparty despite an information barrier, the Agencies would also expect the banking entity to review the effectiveness of its information barrier and make adjustments, as necessary, to avoid future occurrences, or review whether such information barrier is appropriate for that type of conflict.

[215] The Agencies note that a banking entity subject to proposed Appendix C must implement a compliance program that includes, among other things, policies and procedures that explain how the banking entity monitors and prohibits exposure to high-risk assets and high-risk trading strategies, and identifies a variety of assets and strategies (e.g., assets or strategies with significant embedded leverage).

Agencies request comment on the following questions:

Question 190. Is the manner in which the proposed rule implements the limitations of section 13(d)(2) of the BHC Act effective and sufficiently clear? If not, what alternative would be more effective and/or clearer?

Question 191. Is the proposed rule's definition of material conflict of interest effective and sufficiently clear? If not, what alternative would be more effective and/or clearer?

Question 192. Is the proposed definition of material conflict of interest over-or under-inclusive? If so, how should the definition be broader or narrower? Is there an alternative definition that would be appropriate? If so, what definition? Why would that alternative definition better define material conflict of interest for purposes of implementing section 13 of the BHC Act?

Question 193. Would the proposed definition of material conflict of interest have any unintended chilling effect on underwriting, market making, risk-mitigating hedging or other permitted activities? If so, what alternatives might limit such an effect?

Question 194. Would the proposed definition of material conflict of interest lead to unintended consequences? If so, what unintended consequences and why? Please suggest modifications to the proposed definition that would mitigate those consequences.

Question 195. Is it likely that the proposed definition of material conflict of interest would anticipate all future material conflicts of interest, particularly as the financial markets evolve and change? If not, what alternative definition would better anticipate future material conflicts of interest?

Question 196. Does the proposed rule provide sufficient guidance for determining when a material conflict of interest exists? If not, what additional detail should be provided? Should the Agencies adopt an approach similar to that under the securities laws, in which a material conflict of interest is not specifically defined?

Question 197. Are there transactions, classes or types of transactions, or activities inherent in underwriting, market-making, risk-mitigating hedging or other permitted activities that should not be prohibited but may be captured by the proposed definition of material conflict of interest? If so, what transactions and activities? Should they be permitted under the proposed rule? If so, why and under what conditions, if any? Conversely, are there transactions or activities that would be permitted under the proposed rule that should be prohibited? If so, what transactions and activities? Why should they be prohibited under the proposed rule?

Question 198. Please discuss the inherent conflicts of interest that arise from *bona fide* underwriting, market making-related activity, risk-mitigating hedging, or any other permitted activity, and provide specific examples of such inherent conflicts. Do you believe that such conflicts ever result in a materially adverse interest between a banking entity and a client, customer, or counterparty? How should the proposal address inherent conflicts that result from otherwise-permitted activities?

Question 199. Is the manner in which the proposed rule permits the use of disclosure in certain cases to address and mitigate conflicts of interest appropriate? Why or why not? Should additional or alternative requirements be placed on the use of disclosure to address and mitigate conflicts? If so, what additional and alternative requirements, and why? Is the level of detail and specificity required by the proposed rule with respect to disclosure appropriate? If not, what alternative level of detail and specificity would be more appropriate?

Question 200. Should the proposed rule require written disclosure to a client, customer, or counterparty regarding a material conflict of interest? If so, please explain why written disclosure should be required. Are there certain circumstances where written disclosure should be required, but others where oral disclosure should be sufficient? For example, should oral disclosure be permitted for transactions in certain fast-moving markets or transactions with sophisticated clients, customers, or counterparties? If oral disclosure is permitted under certain circumstances, should subsequent written disclosure be required? Please explain.

Question 201. Should the proposed rule provide further detail regarding the types of conflicts of interest that cannot be addressed and mitigated through disclosure? If so, what type of additional detail would be helpful, and why? Should the proposed rule enumerate an exhaustive or non-exhaustive list of conflicts that cannot be addressed and mitigated through disclosure? If so, what conflicts should that list include, and why?

Question 202. Should the proposed rule provide further detail regarding the frequency at which disclosure must be made? Should general disclosure be permitted for certain types of transactions, classes of transactions, or activities? For example, should a banking entity be permitted to make a one-time, written disclosure to a client, customer, or counterparty prior to engaging in a certain type of transaction or activity? Should general disclosure be permitted for certain types of clients, customers, or counterparties (e.g., highly sophisticated parties)? Please explain why specific disclosure (i.e., prior to each transaction, class of transaction, or activity) would not be necessary under the identified circumstances. Are there any clients, customers, or counterparties that should be able to waive a material conflict of interest under certain circumstances? If so, under what circumstances would a waiver approach be appropriate and consistent with the statute? Please explain.

Question 203. Should the proposed definition of material conflict of interest deem certain potential conflicts of interest to not be material conflicts of interest if a banking entity establishes, maintains, and enforces policies and procedures (other than information barriers) reasonably designed to prevent transactions, classes of transactions, or activities that would involve or result in a material conflict of interest? If so, for what types of potential conflicts? What policies and procedures would be appropriate? How would this approach be consistent with the purpose and language of the statute? Should such policies and procedures only be considered effective if they prevent the banking entity from receiving an advantage to the disadvantage of the client, customer, or counterparty?

Question 204. Are there any particular types of clients, customers, or counterparties for whom disclosure of a material conflict of interest should not be required under the proposal, consistent with the statute? Please identify the types of clients, customers, or counterparties for whom disclosure might not be necessary and explain. Why might disclosures be useful for some clients, customers, or counterparties, but not others? Please explain. What characteristics should a firm use in determining whether or not a client, customer, or counterparty needs a particular disclosure?

Question 205. Are there additional steps that a banking entity that seeks to manage conflicts of interest through the use of disclosure should be required to take with regard to disclosure? If so, what steps?

Question 206. Are there circumstances in which disclosure might be impracticable or ineffective? If so, what circumstances, and why?

Question 207. Is the manner in which the proposed rule permits the use of information barriers to address and mitigate conflicts of interest appropriate? Why or why not? Should additional or alternative requirements be placed on the use of information barriers to address and mitigate conflicts? If so, what additional and alternative requirements, and why?

Question 208. Should the proposed rule mandate the use of other means of managing potential conflicts of interest? If so, what specific means should be considered? How effective are any such methods as currently used? Can such methods be circumvented? If so, in what ways?

Question 209. What burdens or costs might be associated with the disclosure-related or information barrier-related requirements contained in the proposed definition of material conflict of interest? How might these burdens or costs be eliminated or reduced in a manner consistent with the purpose and language of section 13 of the BHC Act?

Question 210. Are there specific transactions, classes of transactions or activities that should be managed through consent? If so, what transactions or activities, and why? What form of consent should be required? What level of detail should any such consent include? Should consent only apply to certain conflicts and not others? If so, which conflicts? Are there circumstances in which obtaining consent might be impracticable or ineffective? Should consent be limited to certain types of clients, customers, or counterparties? If so, which clients, customers, or counterparties? Are there certain types of clients, customers, or counterparties for whom consent would never be sufficient? Are there additional steps that a banking entity that seeks to manage conflicts of interest through the use of consent should be required to take? Please specify such steps.

Question 211. What is the potential relationship between, and interplay of, the proposed rule and Section 621 of the Dodd-Frank Act regarding conflicts of interest relating to certain securitizations which contains a prohibition on material conflicts of interest?

Question 212. Should the proposed rule provide for specific types of procedures that would be more effective in managing and mitigating conflicts of interest than others? Do banking entities currently use certain procedures that effectively manage and mitigate material conflicts of interest? If so, please describe such procedures and explain why such procedures are effective. Is the proposed rule consistent with such procedures? Why or why not? What are the costs and benefits of modifying your current procedures in response to the proposed rule?

Question 213. Is the proposed rule's definition of a high-risk asset effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Should the proposed rule specify particular assets that are deemed high-risk *per se*? If so, what assets and why?

Question 214. Is the proposed rule's definition of a high-risk trading strategy effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Should the proposed rule specify particular trading strategies that are deemed high-risk *per se*? If so, what trading strategies and why?

C. Subpart C—Covered Fund Activities and Investments

As noted above, except as otherwise permitted, section 13(a)(1)(B) of the BHC Act prohibits a banking entity from acquiring or retaining any ownership in, or acting as sponsor to, a covered fund.[216] Subpart C of the proposed rule applies those portions of section 13 of the BHC Act that operate as a prohibition or restriction on a banking entity's ability, as principal, directly or indirectly, to acquire or retain an ownership interest in, act as sponsor to, or have certain relationships with, a covered fund. Subpart C also implements the permitted activity and investment authorities provided for under section 13(d)(1) of the BHC Act related to covered fund activities and investments, as well as the rule of construction related to the sale and securitization of loans under section 13(g)(2) of that Act. Additionally, subpart C contains a discussion of the internal controls, reporting and recordkeeping requirements applicable to covered fund activities and investments, and incorporates by reference the minimum compliance standards for banking entities contained in subpart D of the proposed rule, as well as Appendix C, to the extent applicable.

1. Section __.10: Prohibition of Acquisition or Retention of Ownership Interests in, and Certain Relationships With, a Covered Fund

Section __.10 of the proposed rule defines the scope of the prohibition on acquisition or retention of ownership interests in, and certain relationships with, a covered fund, as well as defines a number of key terms related to such prohibition.

a. Prohibition Regarding Covered Fund Activities and Investments

Section __.10(a) of the proposed rule implements section 13(a)(1)(B) of the BHC Act and prohibits a banking entity from, as principal, directly or indirectly, acquiring or retaining an equity, partnership, or other ownership interest in, or acting as sponsor to, a covered fund, unless otherwise permitted under subpart C of the proposed rule.[217] This prohibition reflects the statute's purpose and effect of limiting a banking entity's ability to invest in or have exposure to a covered fund.

The Agencies note that the general prohibition in § __.10(a) of the proposed rule applies solely to a banking entity's acquisition or retention of an ownership interest in or acting as sponsor to a covered fund ''as principal, directly or indirectly.'' [218] As such, the proposed rule would not prohibit the acquisition or retention of an ownership interest (including a general partner or membership interest) in a covered fund: (i) By a banking entity in good faith in a fiduciary capacity, except where such ownership interest is held under a trust that constitutes a company as defined in section (2)(b) of the BHC Act; (ii) by a banking entity in good faith in its capacity as a custodian, broker, or agent for an unaffiliated third party; (iii) by a ''qualified plan,'' as that term is defined in section 401 of the Internal Revenue Code of 1956 (26 U.S.C. 401), if the ownership interest would be attributed to a banking entity solely by operation of section 2(g)(2) of the BHC Act; or (iv) by a director or employee of a banking entity who acquires the interest in his or her personal capacity and who is directly engaged in providing advisory or other services to the covered fund, unless the banking entity, directly or indirectly, extended credit for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the credit was used to acquire such ownership interest in the fund.

Among other things, § __.10(b) of the proposed rule defines the term ''covered fund.'' [219] This definition explains the universe of entities to which the

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[216] *See* 12 U.S.C. 1851(a)(1)(B).

[217] *See* proposed rule § __.10(a).

[218] The Agencies note that this language is intended to prevent a banking entity from evading the restrictions contained in section 13(a)(1)(B) of the BHC Act on acquiring or retaining an ownership interest in a covered fund.

[219] *See* proposed rule § __.10(b)(1). The term banking entity, which is discussed above in Part III.A.2 of this Supplementary Information, is defined in § __.2(e).

prohibition contained in § __.10(a) applies unless the activity is specifically permitted under an available exemption contained in subpart C of the proposed rule. Other related terms, including ''ownership interest,'' ''prime brokerage transaction,'' ''sponsor,'' and ''trustee,'' are in turn defined in §§ __.10(b)(2) through __.10(b)(6) of the proposed rule.

b. ''Covered Fund'' and Related Definitions

i. Definition of ''Covered Fund''

Section 13(h)(2) of the BHC Act defines the terms ''hedge fund'' and ''private equity fund'' to mean ''any issuer that would be an investment company, as defined in the [Investment Company Act], but for section 3(c)(1) or 3(c)(7) of that Act,'' or such similar funds as the Agencies may by rule determine.[220] Given that the statute defines a ''hedge fund'' and ''private equity fund'' synonymously, the proposed rule implements this statutory definition by combining the terms into the definition of a ''covered fund.'' [221]

Sections 3(c)(1) and 3(c)(7) of the Investment Company Act are exclusions from the definition of ''investment company'' in that Act and are commonly relied on by a wide variety of entities that would otherwise be covered by the broad definition of ''investment company'' contained in that Act. As a result, the statutory definition in section 13(h)(2) of the BHC Act could potentially include within its scope many entities and corporate structures that would not usually be thought of as a ''hedge fund'' or ''private equity fund.'' For instance, joint ventures, acquisition vehicles, certain wholly-owned subsidiaries, and other widely-utilized corporate structures typically rely on the exclusion contained in section 3(c)(1) or 3(c)(7) of the Investment Company Act. These types of entities are generally not used to engage in investment or trading activities. Additionally, as noted in Part II.G of this Supplementary Information, certain securitization vehicles may be included in this definition.

The proposed rule follows the scope of the statutory definition by covering an issuer only if it would be an investment company, as defined in the Investment Company Act, *but for* section 3(c)(1) or 3(c)(7) of that Act.[222] Additionally, the proposed rule incorporates the statutory application of the rule to ''such similar funds as the Agencies may determine by rule as provided in section 13(b)(2) of the BHC Act.'' [223] The Agencies have proposed to include as ''similar funds'' a commodity pool,[224] as well as the foreign equivalent of any entity identified as a ''covered fund.'' [225] These entities have been included in the proposed rule as ''similar funds'' given that they are generally managed and structured similar to a covered fund, except that they are not generally subject to the Federal securities laws due to the instruments in which they invest or the fact that they are not organized in the United States or one or more States.

ii. Definition of ''Ownership Interest''

The proposed rule defines ''ownership interest'' in order to make clear the scope of section 13(a)(1)(B) of the BHC Act and § __.10(a)'s prohibition on a banking entity acquiring or retaining any equity, partnership, or other ownership interest in a covered fund. The definition of ownership interest includes a description of what interests constitute an ownership interest, as well as an exclusion from the definition of ownership interest for carried interest.[226] The proposed rule defines ownership interest to mean, with respect to a covered fund, any equity, partnership, or other similar interest (including, without limitation, a share, equity security, warrant, option, general partnership interest, limited partnership interest, membership interest, trust certificate, or other similar interest) in a covered fund, whether voting or nonvoting, as well as any derivative of such interest. This definition focuses on the attributes of the interest and whether it provides a banking entity with economic exposure to the profits and losses of the covered fund, rather than its form. To the extent that a debt security or other interest of a covered fund exhibits substantially the same characteristics as an equity or other ownership interest (e.g., provides the holder with voting rights, the right or ability to share in the covered fund's profits or losses, or the ability, directly or pursuant to a contract or synthetic interest, to earn a return based on the performance of the fund's underlying holdings or investments), the Agencies could consider such instrument an ownership interest as an ''other similar instrument.''

Many banking entities that serve as investment adviser or commodity trading advisor to a covered fund are compensated for services they provide to the fund through receipt of so-called ''carried interest.'' In recognition of the manner in which such compensation is traditionally provided, the proposed rule also clarifies that an ownership interest with respect to a covered fund does not include an interest held by a banking entity (or an affiliate, subsidiary or employee thereof) in a covered fund for which the banking entity (or an affiliate, subsidiary or employee thereof) serves as investment manager, investment adviser or commodity trading advisor, so long as: (i) The sole purpose and effect of the interest is to allow the banking entity (or the affiliate, subsidiary or employee thereof) to share in the profits of the covered fund as performance compensation for services provided to the covered fund by the banking entity (or the affiliate, subsidiary or employee thereof), provided that the banking entity (or the affiliate, subsidiary or employee thereof) may be obligated under the terms of such interest to return profits previously received; (ii) all such profit, once allocated, is distributed to the banking entity (or the affiliate, subsidiary or

[220] 12 U.S.C. 1851(h)(2). Sections 3(c)(1) and 3(c)(7) of the Investment Company Act, in relevant part, provide two exclusions from the definition of ''investment company'' for, as appropriate, (1) any issuer whose outstanding securities are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities (other than short-term paper), or (2) any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time proposes to make a public offering of such securities. *See* 15 U.S.C. 80a–3(c)(1) and (c)(7).

[221] *See* proposed rule § __.10(b)(1).

[222] *See* proposed rule § __.10(b)(1)(i). Under the proposed rule, if an issuer (including an issuer of asset-backed securities) may rely on another exclusion or exemption from the definition of ''investment company'' under the Investment Company Act other than the exclusions contained in section 3(c)(1) or 3(c)(7) of that Act, it would not be considered a covered fund, as long as it can satisfy all of the conditions of an alternative exclusion or exemption for which it is eligible.

[223] 12 U.S.C. 1851(b)(2).

[224] ''Commodity pool'' is defined in the Commodity Exchange Act to mean any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including any: (i) Commodity for future delivery, security futures product, or swap; (ii) agreement, contract, or transaction described in section 2(c)(2)(C)(i) or 2(c)(2)(D)(i) of the Commodity Exchange Act; (iii) commodity option authorized under section 4c of the Commodity Exchange Act; or (iv) leverage transaction authorized under section 23 of the Commodity Exchange Act. *See* 7 U.S.C. 1a(10).

[225] *See* proposed rule § __.10(b)(1)(iii). The proposed rule makes clear that any issuer, as defined in section 2(a)(22) of the Investment Company Act, (15 U.S.C. 80a–2(a)(22)), that is organized or offered outside of the United States, would qualify as a covered fund if, were it organized or offered under the laws, or offered for sale or sold to a resident, of the United States or of one or more States, it would be either: (i) An investment company, as defined in the Investment Company Act, *but for* section 3(c)(1) or 3(c)(7) of that Act; (ii) a commodity pool; or (iii) any such similar fund as the appropriate Federal banking agencies, the SEC, and the CFTC may determine, by rule, as provided in section 13(b)(2) of the BHC Act.

[226] *See* proposed rule § __.10(b)(3).

employee thereof) promptly after being earned or, if not so distributed, the reinvested profit of the banking entity (or the affiliate, subsidiary or employee thereof) does not share in the subsequent profits and losses of the covered fund; (iii) the banking entity (or the affiliate, subsidiary or employee thereof) does not provide funds to the covered fund in connection with acquiring or retaining this carried interest; and (iv) the interest is not transferable by the banking entity (or the affiliate, subsidiary or employee thereof) except to an affiliate or subsidiary.[227] The proposed rule therefore permits a banking entity to receive an interest as performance compensation for services provided by it or one of its affiliates, subsidiaries, or employees to a covered fund, but only if the enumerated conditions are met.

iii. Definition of ''Prime Brokerage Transaction''

Section 13(f)(3) of the BHC Act permits a banking entity to enter into a prime brokerage transaction with a covered fund in which a covered fund managed, organized, or sponsored by such banking entity (or an affiliate or subsidiary thereof) has taken an ownership interest.[228] However, section 13 of the BHC Act does not define what qualifies as a prime brokerage transaction. In order to provide clarity regarding the types of services and relationships that are permitted as a prime brokerage transaction, the proposed rule defines a ''prime brokerage transaction'' to mean one or more products or services provided by a banking entity to a covered fund, such as custody, clearance, securities borrowing or lending services, trade execution, or financing, data, operational, and portfolio management support.[229]

iv. Definition of ''Sponsor'' and ''Trustee''

The proposed rule defines ''sponsor'' in the same manner as section 13(h)(5) of the BHC Act.[230] Section __.10(b)(5) of the proposed rule defines the term ''sponsor'' as an entity that: (i) Serves as a general partner, managing member, trustee, or commodity pool operator of a covered fund; (ii) in any manner selects or controls (or has employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a covered fund; or (iii) shares with a covered fund, for the corporate, marketing, promotional, or other purposes, the same name or a variation of the same name.[231]

The definition of ''sponsor'' contained in section 13(h)(5) of the BHC Act focuses on the ability to control the decision-making and operational functions of the fund. In keeping with this focus, the proposed rule defines the term ''trustee'' (which is a part of the definition of ''sponsor'') to exclude trustee that does not exercise investment discretion with respect to a covered fund, including a directed trustee, as that term is used in section 403(a)(1) of the Employee's Retirement Income Security Act (29 U.S.C. 1103(a)(1)). The proposed rule provides that a ''trustee'' includes any banking entity that directs a directed trustee, or any person who possesses authority and discretion to manage and control the assets of the covered fund.[232]

v. Request for Comment

The Agencies request comment on the proposed rule's approach to defining the terms covered fund, ownership interest, and other related terms. In particular, the Agencies request comment on the following questions:

Question 215. Is the proposed rule's approach to applying section 13 of the BHC Act's restrictions related to covered fund activities and investments to those instances where a banking entity acts ''as principal or beneficial owner'' effective? If not, why? What alternative approach might be more effective in light of the language and purpose of the statute?

Question 216. Does the proposed rule effectively address the circumstances under which an investment by a director or employee of a banking entity in a covered fund would be attributed to a banking entity? If not, why? What alternative might be more effective?

Question 217. Does the proposed rule's definition of ''covered fund'' effectively implement the statute? What alternative definitions might be more effective in light of the language and purpose of the statute?

Question 218. Is specific inclusion of commodity pools within the definition of ''covered fund'' effective and consistent with the language and purpose of the statute? Why or why not?

Question 219. The proposed definition of ''sponsor'' focuses on ''the ability to control the decision-making and operational functions of the fund.'' In the securitization context, is this an appropriate manner to determine the identity of the sponsor? If not, what factors should be used to determine the identity of the sponsor in the securitization context for purposes of the proposed rule and why? Is the definition of ''sponsor'' set forth in the SEC's Regulation AB [233] an appropriate party to treat as sponsor for purposes of the proposed rule? Is additional guidance necessary with respect to how the proposed definition of ''sponsor'' should be applied to a securitization transaction?

Question 220. Should the application of the proposed definition of ''sponsor'' mean that the servicer or investment manager in a securitization transaction would be considered the sponsor for purposes of the proposed rule? What impact would this interpretation of the proposed definition have on existing securitizations?

Question 221. Should the definition of ''covered fund'' focus on the characteristics of an entity rather than whether it would be an investment company but for section 3(c)(1) or 3(c)(7) of the Investment Company Act? If so, what characteristics should be considered and why? Would a definition focusing on an entity's characteristics rather than its form be consistent with the language and purpose of the statute?

Question 222. Instead of adopting a unified definition of ''covered fund'' for those entities included under section 13(h)(2) of the BHC Act, should the Agencies consider having separate definitions for ''hedge fund'' and ''private equity fund''? If so, which definitions and why?

Question 223. Should the Agencies consider using the authority provided under section 13(d)(1)(J) of the BHC Act to exempt the acquisition or retention of an ownership interest in a covered fund with certain attributes or characteristics, including, for example: (i) A performance fee or allocation to an investment manager's equity account calculated by taking into account income and realized and unrealized gains; (ii) borrowing an amount in excess of one-half of its total capital commitments or has gross notional exposure in excess of twice its total capital commitments; (iii) sells securities or other assets short; (iv) has restricted or limited investor redemption rights; (v) invests in public and non-public companies through privately negotiated transactions resulting in private ownership of the business; (vi) acquires the unregistered equity or equity-like securities of such companies that are illiquid as there is

[227] *See* proposed rule § __.10(b)(3)(ii).

[228] *See* 12 U.S.C. 1851(f)(3).

[229] *See* proposed rule § __.10(b)(4).

[230] *See* 12 U.S.C. 1851(h)(5).

[231] *See* proposed rule § __.10(b)(5).

[232] *See* proposed rule § __.10(b)(6)(ii).

[233] *See* 17 CFR 229.1101(*l*).

no public market and third party valuations are not readily available; (vii) requires holding those investments long-term; (viii) has a limited duration of ten years or less; or (ix) returns on such investments are realized and the proceeds of the investments are distributed to investors before the anticipated expiration of the fund's duration? Which, if any, of these characteristics are appropriate to describe a hedge fund or private equity fund that should be considered a covered fund for purposes of this rule? Are there any other characteristics that would be more appropriate to describe a covered fund? If so, which characteristics and why?

Question 224. Is specific inclusion of certain non-U.S. entities as a ''covered fund'' under § __.10(b)(1)(iii) of the proposed rule necessary, or would such entities already be considered to be a ''covered fund'' under § __.10(b)(1)(i) of the proposed rule? If so, why? Does the proposed rule's language on non-U.S. entities correctly describe those non-U.S. entities, if any, that should be included in the definition of ''covered fund''? Why or why not? What alternative language would be more effective? Should we define non-U.S. funds by reference to the following structural characteristics: whether they are limited in the number or type of investors; whether they operate without regard to statutory or regulatory requirements relating to the types of instruments in which they may invest or the degree of leverage they may incur? Why or why not?

Question 225. Are there any entities that are captured by the proposed rule's definition of ''covered fund,'' the inclusion of which does not appear to be consistent with the language and purpose of the statute? If so, which entities and why?

Question 226. Are there any entities that are not captured by the proposed rule's definition of ''covered fund,'' the exclusion of which does not appear to be consistent with the language and purpose of the statute? If so, which entities and why?

Question 227. Do the proposed rule's definitions of ''covered fund'' and/or ''ownership interest'' pose unique concerns or challenges to issuers of asset-backed securities and/or securitization vehicles? If so, why? Do certain types of securitization vehicles (trusts, LLCs, etc.) typically issue asset-backed securities which would be included in the proposed definition of ownership interest? What would be the impact of the application of the proposed rules to these securitization vehicles? Are certain asset classes (collateralized debt obligations, future flows, corporate debt repackages, etc.) more likely to be impacted by the proposed definition of ''covered fund'' because the issuer cannot rely on an exemption other than 3(c)(1) or 3(c)(7) of the Investment Company Act?

Question 228. How many existing issuers of asset-backed securities would be included in the proposed definition of ''covered fund?'' What would be the legal and economic impact of the proposed rule on holders of asset-backed securities issued by existing securitization vehicles that would be included in the proposed definition of covered fund?

Question 229. Are there entities that issue asset-backed securities (as defined in Section 3(a) of the Exchange Act) that should be exempted from the requirements of the proposed rule? How would such an exemption promote and protect the safety and soundness of the banking entity and the financial stability of the United States as required by section 13(d)(1)(J) of the BHC Act?

Question 230. Since certain existing asset-backed securities may have a term that exceeds the conformance or extended transition periods provided for under section 13(c) of the BHC Act, should the Agencies consider using the authority contained in section 13(d)(1)(J) of that Act to exclude those existing asset-backed securities from the proposed definition of ''ownership interest'' and/or should the rule permit a banking entity to acquire or retain an ownership interest in existing asset-backed issuers? If so, how would either approach be consistent with the language and purpose of the statute?

Question 231. Many issuers of asset-backed securities have features and structures that resemble some of the features of hedge funds and private equity funds (e.g., CDOs are managed by an investment adviser that has the discretion to choose investments, including investments in securities). If the proposed definition of ''covered fund'' were to exempt any entity issuing asset-backed securities, would this allow for interests in hedge funds or private equity funds to be structured as asset-backed securities and circumvent the proposed rule? If this approach is taken, how should the proposal address this concern?

Question 232. Are the structural similarities between an entity that issues asset-backed securities and hedge funds and private equity funds of sufficient concern that the Agencies should not exclude any entity that issues asset-backed securities from the definition of covered fund?

Question 233. Should entities that rely on a separate exclusion from the definition of investment company other than sections 3(c)(1) or 3(c)(7) of the Investment Company Act be included in the definition of ''covered fund''? Why or why not?

Question 234. Do the proposed rule's definitions of ''ownership interest'' and ''carried interest'' effectively implement the statute? What alternative definitions might be more appropriate in light of the language and purpose of the statute? Are there other types of instruments that should be included or excluded from the definition of ''ownership interest''? Does the proposed definition of ownership interest capture most interests that are typically viewed as ownership interests? Is the proposed rule's exemption of carried interest from the definition of ownership interest with respect to a covered fund appropriate? Does the exemption adequately address existing compensation arrangements and the way in which a banking entity becomes entitled to carried interest? Is it consistent with the current tax treatment of these arrangements?

Question 235. In the context of asset-backed securities, the distinction between debt and equity may be complicated (e.g., trust certificates issued in a residential mortgage backed security transaction) and the legal, accounting and tax treatment may differ for the same instrument. Is guidance necessary with respect to the application of the definition of ownership interest for asset-backed securitization transactions?

Question 236. In many securitization transactions, the residual interest represents the ''equity'' in the transaction. As this often constitutes the portion of the securitization transaction with the most risk, because it may absorb any losses experienced by the underlying assets before any other interests issued by the securitization vehicle, should the Agencies instead use their authority under section 13(d)(1)(J) of the BHC Act to exempt the buying and selling of any ownership interest in a securitization vehicle that is a covered fund other than the residual interest?

Question 237. For purposes of limiting either an exclusion for issuers of asset-backed securities from the proposed definition of ''covered fund'' and/or an exclusion of asset-backed securities from the proposed definition of ''ownership interest,'' what definition of asset-backed security most effectively implements the language of section 13 of the BHC Act? Section 3(a)(77) of the Exchange Act and the SEC's Regulation

AB [234] provide two possible definitions. Is either of these definitions sufficient, and if so why? If one of the definitions is too narrow, what additional entities/securities should be included and why? If one of the definitions is too broad, what entities/securities should be excluded and why? Would some other definition of asset-backed security be more consistent with the language and purpose of section 13 of the BHC Act?

Question 238. Are there special concerns raised by not including as an ownership interest the residual interests in a securitization vehicle? Should the Agencies instead exempt the buying and selling of any ownership interest in a securitization vehicle that is a covered fund other than the residual interest?

Question 239. Should the legal form of a beneficial interest be a determining factor for deciding whether a beneficial interest is an ''ownership interest''? For example, should pass-through trust certificates issued as part of a securitization transaction be excluded from the definition of ''ownership interest''? Should the definition of ownership interest explicitly include debt instruments with equity features (e.g., voting rights, profit participations, etc.)?

Question 240. How should the proposed rule address those instances in which both debt and equity interests are issued, and the debt interests receive all of the economic benefits and all of the control rights? Should the debt interests (other than the residual interest) be counted as ownership interests even though they are not legally ownership and do not receive any profit participation? Should the equity interests be counted as ownership interests even though the holder does not receive economic benefits or have any control rights? Should the residual interest be considered the only ''ownership interest'' for purposes of the proposed rule? Should mezzanine interests that lack both control rights and profit participation be considered an ownership interest? If the mezzanine interests obtain control rights (because more senior classes have been repaid), should they become ''ownership interests'' at that time for purposes of the proposed rule? If both debt and equity interests are counted as ownership interests, how should percentages of ownership interests be calculated when the units of measurement do not match (e.g., a single trust certificate, a single residual certificate with no face value and multiple classes of currency-denominated notes)?

Question 241. Does the proposed rule's definition of ''prime brokerage transaction'' effectively implement the statute? What other types of transactions or services, if any, should be included in the definition? Should any types of transactions or services be excluded from the definition? Would an alternative definition be more effective, and if so, why?

Question 242. Do the proposed rule's definitions of ''sponsor'' and ''trustee'' effectively implement the statute? Is the exclusion of ''directed trustee'' from the definition of ''trustee'' appropriate?

Question 243. Do the proposed rule's other definitions in § __.10(b) effectively implement the statute? What alternative definitions might be more effective in light of the language and purpose of the statute? Are additional definitions needed, and if so, what definition(s)?

2. Section __.11: Permitted Organizing and Offering of a Covered Fund

Section __.11 of the proposed rule implements section 13(d)(1)(G) of the BHC Act and permits a banking entity to organize and offer a covered fund, including acting as sponsor of the fund, if certain criteria are met.[235] This exemption is designed to permit a banking entity to be able to engage in certain traditional asset management and advisory businesses in compliance with section 13 of the BHC Act.[236]

a. Required Criteria for Permitted Organizing and Offering of Covered Funds

Section __.11 of the proposed rule provides for and describes the conditions that must be met in order to enable a banking entity to qualify for the exemption to organize and offer a covered fund.[237] These conditions include: (i) The banking entity must provide *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;[238] (ii) the covered fund must be organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the banking entity; (iii) the banking entity may not acquire or retain an ownership interest in the covered fund except as permitted under subpart C of the proposed rule; (iv) the banking entity must comply with the restrictions governing relationships with covered funds under § __.16 of the proposed rule; (v) the banking entity may not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; (vi) the covered fund, for corporate, marketing, promotional, or other purposes, (A) may not share the same name or a variation of the same name with the banking entity(or an affiliate or subsidiary thereof), and (B) may not use the word ''bank'' in its name; (vii) no director or employee of the banking entity may take or retain an ownership interest in the covered fund, except for any director or employee of the banking entity who is directly engaged in providing investment advisory or other services to the covered fund; and (viii) the banking entity must (A) clearly and conspicuously disclose, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents) the enumerated disclosures contained in § __.11(h) of the proposed rule, and (B) comply with any additional rules of the appropriate Agency or Agencies, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the banking entity.[239] These requirements are explained in detail below.

i. Bona Fide Services

Section __.11(a) of the proposed rule requires that, in order to qualify for the exemption related to organizing and offering a covered fund, a banking entity provide *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services.[240] Banking entities provide a wide range of customer-oriented services which may qualify as *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services.[241] Additionally, depending on the type of banking entity that conducts the activity or provides the service, variations in the

[234] *See* 17 CFR 229.1101(c).

[235] *See* proposed rule § __.11.

[236] 156 Cong. Rec. S5889 (daily ed. July 15, 2010) (statement of Sen. Hagan).

[237] *See* proposed rule §§ __.11(a)–(h).

[238] While section 13(d)(1)(G) of the BHC Act does not explicitly mention ''commodity trading advisory services,'' the Agencies have proposed to include commodity pools within the definition of ''covered fund'' and commodity trading advisory services in the same way as investment advisory services because commodity trading advisory services are the functional equivalent of investment advisory services to commodity pools.

[239] *See id.* at § __.11(a)–(h). The Agencies are not proposing any such additional rules at this time, although they may do so in the future.

[240] *See* 12 U.S.C. 1851(d)(1)(G)(i); proposed rule § __.11(a).

[241] *See, e.g.,* 12 U.S.C. 1843(c)(4), (c)(8), (k),12 CFR 225.28(b)(5) and (6), 12 CFR 225.86, 12 CFR 225.125 (with respect to a bank holding company); 12 U.S.C. 24 (Seventh), 92a, 12 CFR Part 9 (with respect to a national bank); 12 U.S.C. 1831a, 12 CFR Part 362 (with respect to a state nonmember bank).

precise services involved may occur. For example, a national bank and an SEC-registered investment adviser may provide substantially similar investment advisory services to clients, but be subject to different statutory and regulatory requirements. In recognition of potential variations in services and functional regulation, the proposed rule does not specify what services would qualify as ''*bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services'' under § __.11(a) of the proposed rule. Instead, the proposed rule largely mirrors the statutory language of section 13(d)(1)(G)(i) of the BHC Act and reflects the intention that so long as a banking entity provides trust, fiduciary, investment advisory, or commodity trading advisory services in compliance with relevant statutory and regulatory requirements, the requirement contained in § __.11(a) of the proposed rule would generally be deemed to be satisfied.

ii. ''Customers of Such Services'' Requirement

Section 13(d)(1)(G)(ii) of the BHC Act requires that a banking entity organize and offer a covered fund ''only in connection with'' the provision of qualified services to persons that are customers of such services of the banking entity.[242] Section __.11(b) of the proposed rule implements the statute and reflects the statutory requirement that there are two independent conditions contained in section 13(d)(1)(G)(ii) of the BHC Act: (i) A covered fund must be organized and offered in connection with *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services, and (ii) the banking entity providing those services may offer the covered fund only to persons that are customers of those services of the banking entity.[243] Requiring a customer relationship in connection with organizing and offering a covered fund helps to ensure that a banking entity is engaging in the covered fund activity for others and not on the banking entity's own behalf.[244]

Section 13(d)(1)(G)(ii) of the BHC Act does not explicitly require that the customer relationship be pre-existing. Accordingly, the proposed rule provides that it may be established through or in connection with the banking entity's organization and offering of a covered fund, so long as that fund is a manifestation of the provision by the banking entity of *bona fide* trust, fiduciary, investment advisory or commodity trading advisory services to the customer. This application of the customer requirements is consistent with the manner in which trust, fiduciary, investment advisory, and commodity trading advisory services are provided by banking entities. Historically, banking entities have raised capital commitments for covered funds from existing customers as well as individuals or entities that have no pre-existing relationship with the banking entity.

Banking entities commonly organize and offer funds to customers of the banking entity's trust, fiduciary, and investment advisory or commodity trading advisory services as a way of ensuring the efficient and consistent provision of these services. For example, a person often obtains the investment advisory services of the banking entity by acquiring an interest in a fund organized and offered by the banking entity. This is distinguished from a fund organized and offered by a banking entity for the purpose of itself investing as principal, indirectly through its investment in the fund, in assets held by the fund. Under the proposed rule, a banking entity could, consistent with past practice, provide a covered fund to persons that are customers of such services for purposes of the exemption so long as the fund is organized and offered as a means of providing *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services to customers. The banking entity may not organize and offer a covered fund as a means of itself investing in the fund or assets held in the fund.[245]

The Agencies note that a banking entity could, through organizing and offering a covered fund pursuant to the authority contained in § __.11 of the proposed rule that itself makes investments or engages in trading activity, seek to evade the restrictions contained in section 13 of the BHC Act and the proposed rule. In order to address these concerns, the proposed rule provides that a banking entity relying on the authority contained in § __.11 must organize and offer a covered fund pursuant to a credible plan or similar documentation outlining how the banking entity intends to provide advisory or similar services to its customers through organizing and offering such fund.

iii. Compliance With Investment Limitations

Section 13(d)(1)(G)(iii) of the BHC Act limits the ability of a banking entity that organizes and offers a covered fund to acquire or retain an ownership interest in that covered fund.[246] Separately, other provisions of section 13 of the BHC Act provide independent exemptions which permit a banking entity to acquire or retain an ownership interest in a covered fund.[247] Section __.11(c) of the proposed rule incorporates these statutory provisions by prohibiting a banking entity from acquiring or retaining an ownership interest in a covered fund that it organizes and offers except as permitted under subpart C of the proposed rule.[248] The limits on a banking entity's ability to invest in a covered fund that it organizes and offers are described in § __.12 of the proposal.

iv. Compliance With Section 13(f) of the BHC Act

Section __.11(d) of the proposed rule requires that the banking entity comply with the limitations on certain relationships with covered funds.[249] These limitations apply in several contexts, and are contained in § __.16 of the proposed rule, discussed in detail below. In general, § __.16 of the proposed rule prohibits certain transactions or relationships that would be covered by section 23A of the FR Act, and provides that any permitted transaction is subject to section 23B of the FR Act, in each instance as if such banking entity were a member bank and such covered fund were an affiliate thereof.[250]

v. No Guarantees or Insurance of Fund Performance

Section __.11(e) of the proposed rule prohibits the banking entity from, directly or indirectly, guaranteeing, assuming or otherwise insuring the obligations or performance of the covered fund or any covered fund in which such covered fund invests.[251]

[242] *See* 12 U.S.C. 1851(d)(1)(G)(ii).

[243] *See* proposed rule § __.11(b).

[244] *See* 156 Cong. Rec. at S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley).

[245] The proposed rule does not change any requirement imposed by separate statute, regulation, or other law, if applicable. For instance, a banking entity that conducts a private placement of a covered fund pursuant to the SEC's Regulation D pertaining to private offerings would still be expected to comply with the relevant requirements related to such offering, including the limitations related to the manner in which and types of persons to whom it may offer or sell interests in such fund. *See* 12 CFR 230.501 *et seq.*

[246] *See* 12 U.S.C. 1851(d)(1)(G)(iii).

[247] *See, e.g., id.* at 1851(d)(1)(C).

[248] *See* proposed rule § __.11(c).

[249] 12 U.S.C. 1851(d)(1)(G)(iv); proposed rule § __.11(d).

[250] *See* Supplementary Information, Part III.C.7.

[251] 12 U.S.C. 1851(d)(1)(G)(v); proposed rule § __.11(e).

This prong implements section 13(d)(1)(G)(iv) of the BHC Act and is intended to prevent a banking entity from engaging in bailouts of a covered fund in which it has an interest.[252]

vi. Limitation on Name Sharing With a Covered Fund

Section __.11(f) of the proposed rule prohibits the covered fund from sharing the same name or a variation of the same name with the banking entity, for corporate, marketing, promotional, or other purposes.[253] This section implements section 13(d)(1)(G)(v) of the BHC Act and addresses the concern that name-sharing could undermine market discipline and encourage a banking entity to bail out a covered fund it organizes and offers in order to preserve the entity's reputation.[254] Thus, under § __.11(f) of the proposed rule, a covered fund would be prohibited from sharing the same name or variation of the same name with a banking entity that organizes and offers or serves as sponsor to that fund (or an affiliate or subsidiary of such banking entity). A covered fund would also be prohibited under the proposed rule from using the word ''bank'' in its name.[255]

vii. Limitation on Ownership by Directors and Employees

Section __.11(g) of the proposed rule implements section 13(d)(1)(G)(vii) of the BHC Act. The provision prohibits any director or employee of the banking entity from acquiring or retaining an ownership interest in the covered fund, except for any director or employee of the banking entity who is directly engaged in providing investment advisory or other services to the covered fund.[256] This allows an individual acting as fund manager or adviser and employed by a banking entity to acquire or retain an ownership interest in a covered fund that aligns the manager or adviser's incentives with those of its customers by allowing the individual to have ''skin in the game'' with respect to a covered fund for which that individual provides management or advisory services (which customers or clients often request).[257]

The Agencies recognize that director or employee investments in a covered fund may provide an opportunity for a banking entity to evade the limitations regarding the amount or value of ownership interests a banking entity may acquire or retain in a covered fund or funds contained in section 13(d)(4) of the BHC Act and § __.12 of the proposed rule. In order to address this concern, the proposed rule would generally attribute an ownership interest in a covered fund acquired or retained by a director or employee to such person's employing banking entity, if the banking entity either extends credit for the purpose of allowing the director or employee to acquire such ownership interest, guarantees the director or employee's purchase, or guarantees the director or employee against loss on the investment.

viii. Disclosure Requirements

Section __.11(h) of the proposed rule requires that, in connection with organizing and offering a covered fund, the banking entity (i) clearly and conspicuously disclose, in writing, to prospective and actual investors in the covered fund (such as through disclosure in the covered fund's offering documents) that ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the banking entity and its affiliates or subsidiaries]; therefore, [the banking entity's and its affiliates' or subsidiaries'] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity and its affiliates or subsidiaries] in their capacity as investors in [the covered fund],'' and (ii) comply with any additional rules of the appropriate Agency as provided in section 13(b)(2) of the BHC Act designed to ensure that losses in any such covered fund are borne solely by the investors in the covered fund and not by the banking entity.[258] The proposed rule also provides, as an additional disclosure requirement related to organizing and offering a covered fund, that a banking entity clearly and conspicuously disclose, in writing, to any prospective and actual investor (such as through disclosure in the covered fund's offering documents): (i) That such investor should read the fund offering documents before investing in the covered fund; (ii) that the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case); and (iii) the role of the banking entity and its affiliates, subsidiaries, and employees in sponsoring or providing any services to the covered fund. As noted above, the proposed rule clarifies that a banking entity may satisfy the requirements of this prong with respect to a covered fund by making the required disclosures, in writing, in the covered fund's offering documents.[259]

ix. Request for Comment

The Agencies request comment on the proposed rule's approach with respect to implementing the exemption permitting banking entities to organize and offer a covered fund. In particular, the Agencies request comment on the following questions:

Question 244. Is the proposed rule's approach to implementing the exemption for organizing and offering a covered fund effective? If not, what alternative approach would be more effective and why?

Question 245. Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 246. Is the proposed rule's approach to implementing the scope of *bona fide* trust, fiduciary, investment advisory and commodity trading advisory services consistent with the statute? If not, what alternative approach would be more effective? Should the scope of such services be broader or, in the alternative, more limited? Are there specific services which should be included but which are not currently under the proposed rule?

Question 247. Does the proposed rule effectively implement the ''customers of such services'' requirement? If not, what alternative approach would be more effective and why? Is the proposed rule's approach consistent with the statute? Why or why not? How do banking entities currently sell or provide interests in covered funds? Do banking entities rely on a concept of ''customer'' by reference to other laws or

[252] *See* 156 Cong. Rec. S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley).

[253] 12 U.S.C. 1851(d)(1)(G)(vi); proposed rule § __.11(f).

[254] 156 Cong. Rec. S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley).

[255] Similar restrictions on a fund sharing the same name, or variation of the same name, with an insured depository institution or company that controls an insured depository institution or having the word ''bank'' in its name, have been used previously in order to prevent customer confusion regarding the relationship between such companies and a fund. *See, e.g., Bank of Ireland,* 82 Fed. Res. Bull. 1129 (1996).

[256] *See* 12 U.S.C. 1851(d)(1)(G)(vii); proposed rule § __.11(g).

[257] *See* 156 Cong. Rec. S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley).

[258] 12 U.S.C. 1851(d)(1)(G)(viii); proposed rule § __.11(h).

[259] As contemplated in § __.11(a)(8)(ii) of the proposed rule, to the extent that any additional rules are issued to ensure that losses in a covered fund are borne solely by the investors in the covered fund and not by the banking entity, a banking entity would be required to comply with those as well in order to satisfy the requirements of section 13(d)(1)(G)(viii) of the BHC Act.

regulations, and if so, what laws or regulations?

Question 248. Does the proposed rule effectively and clearly recognize the manner in which banking entities provide trust, fiduciary, investment advisory, or commodity trading advisory services to customers? If not, how should the proposed rule be modified to be more effective or clearer?

Question 249. Should the Agencies consider adopting a definition of ''customer of such services'' for purposes of implementing the exemption related to organizing and offering a covered fund? If so, what criteria should be included in such definition? For example, should the customer requirement specify that the relationship be pre-existing? Should the Agencies consider adopting an existing definition related to ''customer'' and if so, what definitions (for instance, the SEC's ''pre-existing, substantive relationship'' concept applicable to private offerings under its Regulation D) would provide for effective implementation of the customer requirement in section 13(d)(1)(G) of the BHC Act? If so, why and how? How should the customer requirement be applied in the context of non-U.S. covered funds? Is there an equivalent concept used for such non-U.S. covered fund offerings?

Question 250. Should the Agencies distinguish between direct and indirect customer relationships for purposes of implementing section 13(d)(1)(G) of the BHC Act? Should the rule differentiate between a customer relationship established by a customer as opposed to a banking entity? If so, why?

Question 251. Does the proposed rule effectively implement the prohibition on a banking entity guaranteeing or insuring the obligations or performance of certain covered funds? If not, what alternative approach would be more effective, and why?

Question 252. Does the proposed rule effectively implement the requirement that a banking entity comply with the limitation on certain relationships with a covered fund contained in § __.16 of the proposed rule? If not, what alternative approach would be more effective, and why?

Question 253. Does the proposed rule effectively implement the prohibition on a covered fund sharing the same name or variation of the same name with a banking entity? If not, what alternative approach would be more effective and why? Should the prohibition on a covered fund sharing the same name be limited to specific types of banking entities (e.g., insured depository institutions and bank holding companies) or only to the banking entity that organizes and offers the fund, and if so why?

Question 254. Does the proposed rule effectively implement the limitation on director or employee investments in a covered fund organized and offered by a banking entity? If not, what alternative approach would be more effective and why? Should the agencies provide additional guidance on what ''other services'' should be included for purposes of satisfying § __.11(g)? Why or why not?

Question 255. Are the disclosure requirements related to organizing and offering a covered fund appropriate? If not, what alternative disclosure requirement(s) should the proposed rule include? Should the Agencies consider adoption of a model disclosure form related to this requirement? Does the timing of the proposed disclosure requirement adequately address disclosure to secondary market purchasers?

3. Section __.12: Permitted Investment in a Covered Fund

Section __.12 of the proposed rule describes the limited circumstances under which a banking entity may acquire or retain, as an investment, an ownership interest in a covered fund that the banking entity or one of its subsidiaries or affiliates organizes and offers. This section implements section 13(d)(4) of the BHC Act and related provisions, and describes the statutory limits on both (i) the amount and value of an investment by a banking entity in a covered fund, and (ii) the aggregate value of all investments in all covered funds made by the banking entity.

As described below, a banking entity that makes or retains an investment in a covered fund under § __.12 of the proposed rule is generally subject to three principal limitations related to such investment. First, the banking entity's investment in a covered fund may not represent more than 3 percent of the total outstanding ownership interests of such fund (after the expiration of any seeding period provided under the rule). Second, the banking entity's investment in a covered fund may not result in more than 3 percent of the losses of the covered fund being allocable to the banking entity's investment. Third, a banking entity may invest no more than 3 percent of its tier 1 capital in covered funds.[260]

[260] *See, e.g.,* proposed rule §§ __.12(b)(2), (c).

a. Authority and Limitations on Permitted Investments

Section 13(d)(4) of the BHC Act permits a banking entity to acquire and retain an ownership interest in a covered fund that the banking entity organizes and offers pursuant to section 13(d)(1)(G), for the purposes of (i) establishing the covered fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, or (ii) making a *de minimis* investment in the covered fund in compliance with applicable requirements.[261] Section __.12 of the proposed rule implements this authority and related limitations.

Consistent with this statutory provision, the proposed rule requires a banking entity to (i) actively seek unaffiliated investors to ensure that the banking entity's investment conforms with the limits of § __.12, and (ii) reduce through redemption, sale, dilution, or other methods the aggregate amount and value of all ownership interests of the banking entity in a single fund held under § __.12 to an amount that does not exceed 3 percent of the total outstanding ownership interests of the fund not later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board pursuant to § __.12(e) of the proposed rule) (the ''per-fund limitation''). Additionally, § __.12 of the proposed rule implements the statutory requirement that the aggregate value of all ownership interests of the banking entity in all covered funds held as an investment not exceed 3 percent of the tier 1 capital of the banking entity (the ''aggregate funds limitation'').[262]

b. Permitted Investment in a Single Covered Fund

Section __.12(b) of the proposed rule describes the limitations and restrictions on a banking entity's ability to make or retain an investment in a single covered fund. This section implements the requirements of section 13(d)(4) of the BHC Act.[263]

Section __.12 of the proposed rule describes the manner in which the limitations on the amount and value of ownership interests in a covered fund must be calculated, in recognition of the fact that a covered fund may have multiple classes of ownership interests which possess different characteristics

[261] *See* 12 U.S.C. 1851(d)(4).

[262] *See* proposed rule at § __.12(a)(2)(ii). The process and manner in which a banking entity's 3 percent tier 1 capital limit is determined for purposes of the proposed rule is discussed in detail below in Part III.C.3 of this Supplementary Information.

[263] *See* 12 U.S.C. 1851(d)(4)(B).

or values that impact a person's ownership in that fund. A banking entity must apply the limits to both the total value and amount of its investment in a covered fund. For purposes of applying these limits, the banking entity must calculate (without regard to committed funds not yet called for investment): (i) The value of all investments or capital contributions made with respect to any ownership interest by the banking entity in a covered fund, divided by the value of all investments or capital contributions made by all persons in that covered fund, and (ii) the total number of ownership interests held as an investment by the banking entity in a covered fund divided by the total number of ownership interests held by all persons in that covered fund.[264] Therefore, under the proposed rule, such calculation would include as the numerator the amount or value of a banking entity's investment in a covered fund, and as the denominator the amount or value (matched to the unit of measurement in the numerator) of all classes of ownership interests held by all persons in that covered fund. As noted above, the banking entity's investment in a covered fund also may not result in more than 3 percent of the losses of the covered fund being allocable to the banking entity's investment.[265]

In order to ensure that a banking entity calculates its investment in a covered fund accurately and does not evade the per-fund investment limitation, the proposed rule requires that the banking entity must calculate its investment in the same manner and according to the same standards utilized by the covered fund for determining the aggregate value of the fund's assets and ownership interests in the covered fund.[266]

Under the proposed rule, the amount and value of a banking entity's investment in any single covered fund is (i) the total amount or value held by the banking entity directly and through any entity that is controlled, directly or indirectly, by the banking entity,[267] plus (ii) the *pro rata* amount or value of any covered fund held by any entity (other than certain operating entities noted below) that is not controlled, directly or indirectly, by the banking entity but in which the banking entity owns, controls, or holds with the power to vote more than 5 percent of the voting shares.[268]

Additionally, the proposed rule provides that, to the extent that a banking entity is contractually obligated to directly invest in, or is found to be acting in concert through knowing participation in a joint activity or parallel action toward a common goal of investing in, one or more investments with a covered fund that is organized and offered by the banking entity (whether or not pursuant to an express agreement), such investment shall be included in the calculation of a banking entity's per-fund limitation.[269] In this way, the proposed rule prevents a banking entity from evading the limitations under § __.12 of the proposed rule through committed co-investments.

Section __.12(b)(3) of the proposed rule provides that the amount and value of a banking entity's investment in a covered fund may at no time exceed the 3 percent limits contained in § __.12(b) of the proposed rule after the conclusion of any conformance period, if applicable.[270] In cases where a fund calculates its value or stands ready to issue or redeem interests frequently (e.g., daily), a banking entity must calculate its per-fund limitation no less frequently than the fund performs such calculation or issues or redeems interests. In recognition of the fact that not every covered fund may calculate or determine its valuation daily (for instance, if it does not allow redemptions except infrequently or invests principally in illiquid assets for which no market price is readily available), the proposed rule would not require a daily calculation of value for such fund (unless a daily calculation is determined by the fund).[271] In such cases, the calculation of the amount and value of a banking entity's per-fund limitation must be made no less frequently than at the end of every quarter.[272] Additionally, since a banking entity must organize and offer any covered fund in which it invests, the Agencies expect that such banking entity would closely and regularly monitor not only the value of such fund's interests, but also any changes in the fund's investors' relative ownership percentages.[273]

c. Aggregate Permitted Investments in All Covered Funds and Calculation of a Banking Entity's Tier 1 Capital

In addition to a limit on investments in a single covered fund, section 13(d)(4) of the BHC Act requires the banking entity to comply with the aggregate funds limitation on investments in all covered funds.[274] As required under section 13(d)(4)(B)(ii)(II) of the BHC Act, the proposed rule provides that the aggregate of a banking entity's ownership interests in all covered funds that are held under § __.12 of the proposed rule may not exceed 3 percent of the tier 1 capital of a banking entity.[275] In order to maintain equality in application of the aggregate funds limitation, the proposed rule provides that, for purposes of determining compliance with § __.12 of the proposed rule, the aggregate of all of a banking entity's investments in all covered funds under § __.12 of the proposed rule must be valued pursuant to applicable accounting standards.[276] This value calculation is separate and in addition to the required calculation of the value of a banking entity's investment in a covered fund as part of determining compliance with the per-fund limitation.

Tier 1 capital is a banking law concept that, in the United States, is

[264] *See* proposed rule § __.12(b)(2).

[265] Under the proposed rule, a banking entity's investment in a covered fund may not result in more than 3 percent of the losses of the covered fund being allocable to the banking entity's investment since the banking entity's permitted investment in a covered fund may be no more than 3 percent of the value and amount of such fund's total ownership interests, and the banking entity may not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund. *See* 12 U.S.C. 1851(d)(1)(G)(v); proposed rule § __.11(e).

[266] *See* proposed rule § __.12(b)(4).

[267] *See* proposed rule § __.12(b)(1)(A).

[268] *See* proposed rule § __.12(b)(1)(B). As noted above, whether or not an investment is controlled or noncontrolled will be determined consistent with the BHC Act, as implemented by the Board. *See* 12 U.S.C. 1841(a)(2); 12 CFR 225.2(e).

[269] *See* proposed rule § __.12(b)(2)(B).

[270] *See* proposed rule § __.12(b)(3).

[271] With respect to an issuer of asset-backed securities, depending on the transaction structure, such calculation may need to be made each time a payment is made to any holder of the issuer's asset-backed securities.

[272] The Agencies note that while calculation of a banking entity's ownership interest in a covered fund must be determined no less frequently than at the end of every quarter, it is possible that no change in a banking entity's ownership interest (e.g., no redemptions or other changes in investor composition) may occur during every quarter.

[273] For instance, where a banking entity acts as sponsor to a covered fund, in connection with the organizing and offering of that fund it may include a requirement (such as a ''tag-along'' redemption right) in the fund's organizational documents in order to assist the banking entity in complying with the per-fund investment limitation.

[274] As noted in the discussion regarding the per-fund limitation, the proposed rule provides that, for purposes of determining compliance with § __.12, the banking entity's permitted investment in a covered fund shall be calculated in the same manner and according to the same standards utilized by the covered fund for determining the aggregate value of the fund's assets and ownership interests. However, the value of a banking entity's aggregate permitted investments in all covered funds shall be determined in accordance with applicable accounting standards. *See* proposed rule § __.12(c)(1).

[275] *See* 12 U.S.C. 1851(d)(4)(B)(ii)(II); proposed rule § __.12(a)(2)(ii).

[276] *See* proposed rule § __.12(c)(1).

calculated and reported by certain depository institutions and bank holding companies in order to determine their compliance with regulatory capital standards. Accordingly, the proposed rule clarifies that for purposes of the aggregate funds limitation in § __.12, a banking entity that is a bank, a bank holding company, a company that controls an insured depository institution that reports tier 1 capital, or uninsured trust company that reports tier 1 capital (each a ''reporting banking entity'') must apply the reporting banking entity's tier 1 capital as of the last day of the most recent calendar quarter that has ended, as reported to the relevant Federal banking agency.[277]

However, not all entities subject to section 13 of the BHC Act calculate and report tier 1 capital. In order to provide a measure of equality related to the aggregate funds limitation contained in section 13(d)(4)(B)(ii)(II) of the BHC Act and § __.12(c) of the proposed rule, the proposed rule clarifies how the aggregate funds limitation shall be calculated for entities that are not required to calculate and report tier 1 capital in order to determine compliance with regulatory capital standards. Under the proposed rule, with respect to any banking entity that is not affiliated with a reporting banking entity and not itself required to report capital in accordance with the risk-based capital rules of a Federal banking agency, the banking entity's tier 1 capital for purposes of the aggregate funds limitation shall be the total amount of shareholders' equity of the top-tier entity within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.[278] For a banking entity that is not itself required to report tier 1 capital but is a subsidiary of a reporting banking entity that is a depository institution (e.g., a subsidiary of a national bank), the aggregate funds limitation shall be the amount of tier 1 capital reported by such depository institution.[279] For a banking entity that is not itself required to report tier 1 capital but is a subsidiary of a reporting banking entity that is not a depository institution (e.g., a nonbank subsidiary of a bank holding company), the aggregate funds limitation shall be the amount of tier 1 capital reported by the top-tier affiliate of such banking entity that holds and reports tier 1 capital.[280] Thus, for purposes of calculating the aggregate funds limitation under § __.12(c)(2) of the proposed rule, the tier 1 capital for the different types of banking entities would be as follows:

Type of banking entity	*Tier 1 capital for purposes of § __.12*
Depository institution that is a reporting banking entity (or a subsidiary thereof).	Tier 1 capital of the depository institution as of the last day of the most recent calendar quarter that has ended, as reported to the relevant Federal banking agency.
Bank holding company or a subsidiary thereof (other than a reporting banking entity).	Tier 1 capital of the bank holding company as of the last day of the most recent calendar quarter that has ended, as reported to the Board.
Company that controls an insured depository institution and that is a reporting banking entity (or a subsidiary thereof other than a reporting banking entity).	Tier 1 capital of the top tier entity within such organization as of the last day of the most recent calendar quarter that has ended, as reported to the Board.
Other banking entity (including an industrial loan company holding company, thrift holding company, or a subsidiary thereof).	Shareholders' equity of the top-tier entity within such organization as of the last day of the most recent calendar quarter that has ended, under applicable accounting standards.

Additionally, in the case of a depository institution that is itself a reporting banking entity and is also a subsidiary or affiliate of a reporting banking entity, the aggregate of all investments in all covered funds held by the depository institution (including investments by its subsidiaries) may not exceed 3 percent of either the tier 1 capital of the depository institution or of the top-tier reporting banking entity that controls such depository institution.[281]

d. Deduction of an Investment in a Covered Fund From Tier 1 Capital

Section 12(d) of the proposed rule also implements the provision contained in section 13(d)(4)(b)(iii) of the BHC Act regarding the deduction of a banking entity's aggregate investment in a covered fund held under section 13(d)(4) of that Act from the assets and tangible equity of the banking entity. The statute also provides that the amount of the deduction must increase commensurate with the leverage of the underlying fund.[282]

Section __.12(d) of the proposal requires a banking entity to deduct the aggregate value of its investments in covered funds from tier 1 capital. Since § __.12 of the proposed rule implements the authorities contained in section 13(d)(4) of the BHC Act related to an investment in a fund organized and offered by the banking entity (or an affiliate or subsidiary thereof), the deduction contained in § __.12(d) applies only to those ownership interests held as an investment by a banking entity pursuant to § __.12 of the proposed rule.[283] For instance, a banking entity that acquires or retains an ownership interest in a covered fund as a permitted risk-mitigating hedge under § __.13(b) of the proposed rule, or that acquires or retains an ownership interest in the course of collecting a debt previously contracted in good faith, would not be required to deduct the value of such ownership interest from its tier 1 capital.[284] The deduction required under § __.12(d) of the proposed rule must be calculated consistent with other like deductions under the applicable risk-based capital rules.[285]

[277] *See* proposed rule § __.12(c)(1)(A).

[278] *See* proposed rule § __.12(c)(2)(ii)(B)(2).

[279] *See* proposed rule § __.12(c)(2)(ii)(A).

[280] *See* proposed rule § __.12(c)(1)(B).

[281] If the aggregate value of all investments in all covered funds attributable to such a depository institution is less than 3 percent of its tier 1 capital, then that amount of capital which is greater than the amount supporting the depository institution's investments (or those held by its subsidiaries) in a covered fund, but less than 3 percent of the depository institution's tier 1 capital, may be used to support an investment in a covered fund by an affiliated banking entity that is not itself a depository institution that holds and reports tier 1 capital or controlled, directly or indirectly, by such a depository institution.

[282] *See* 12 U.S.C. 1851(d)(4)(B)(iii).

[283] *See* proposed rule § __.12(d).

[284] The Agencies note that since this deduction from capital implements Section 13(d)(4)(B)(iii) of the BHC Act, it is being included in this proposed rule which deals with Section 13 of the BHC Act. However, the Agencies may relocate this deduction as part of any later revised capital rules if, in the future, it is determined that inclusion in such rules is more appropriate.

[285] *See* 12 CFR part 208, Appendices A, E, and F (for a state member bank); 12 CFR part 225, Appendices A, E, and G (for a bank holding

Continued

e. Extension of Time To Divest an Ownership Interest in a Single Covered Fund

Section 13(d)(4)(C) of the BHC Act permits the Board, upon application by a banking entity, to extend for up to 2 additional years the period of time within which a banking entity must reduce its attributable ownership interests in a covered fund to no more than 3 percent of such fund's total ownership interests.[286] The statute provides the possibility of an extension only with respect to the per-fund limitation, and not to the aggregate funds limitation.[287] Section __.12(e) of the proposed rule implements this provision of the statute. In order to grant any extension, the Board must determine that the extension would be consistent with safety and soundness and would not be detrimental to the public interest.[288]

Section __.12(e) of the proposed rule requires any banking entity that seeks an extension of this conformance period to submit a written request to the Board. Under the proposal, any such request must: (i) Be submitted in writing to the Board at least 90 days prior to the expiration of the applicable time period; (ii) provide the reasons why the banking entity believes the extension should be granted; and (iii) provide a detailed explanation of the banking entity's plan for reducing or conforming its investment(s).

In addition, the proposed rule provides that any extension request by a banking entity must address each of the following matters (to the extent they are relevant): (i) Whether the investment would—(A) involve or result in material conflicts of interest between the banking entity and its clients, customers or counterparties; (B) result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies; (C) pose a threat to the safety and soundness of the banking entity; or (D) pose a threat to the financial stability of the United States; (ii) market conditions; (iii) the contractual terms governing the banking entity's interest in the covered fund; (iv) the date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in section 12(a)(2)(i)(B) of the proposed rule; (v) the total exposure of the banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity or the financial stability of the United States; (vi) the cost to the banking entity of divesting or disposing of the investment within the applicable period; (vii) whether the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated clients, customers or counterparties to which it owes a duty; (viii) the banking entity's prior efforts to divest or sell interests in the covered fund, including activities related to the marketing of interests in such covered fund; and (ix) any other factor that the Board believes appropriate.[289] Under the proposed rule, the Board would consider requests for an extension in light of all relevant facts and circumstances, including the factors described above.

Section __.12(e) of the proposed rule also would allow the Board to impose conditions on any extension granted under the proposed rule if the Board determines conditions are necessary or appropriate to protect the safety and soundness of banking entities or the financial stability of the United States, address material conflicts of interest or other unsound practices, or otherwise further the purposes of section 13 of the BHC Act and the proposed rule.[290] In cases where the banking entity is primarily supervised by another Agency, the Board would consult with such Agency both in connection with its review of the application and, if applicable, prior to imposing conditions in connection with the approval of any request by the banking entity for an extension of the conformance period under the proposed rule.[291]

f. Request for Comment

The Agencies request comment on the proposed rule's approach to implementing the exemption which allows a banking entity to make or retain a permitted investment in a covered fund that it organizes and offers. In particular, the Agencies request comment on the following questions:

Question 256. Is the proposed rule's approach to implementing the exemption that allows a banking entity to make or retain a permitted investment in a covered fund effective? If not, what alternative approach would be more effective and why?

Question 257. Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 258. Should the proposed rule specify at what point a covered fund will be considered to have been ''established'' for purposes of commencing the period in which a banking entity may own more than 3 percent of the total outstanding ownership interests in such fund? If so, why and how?

Question 259. Does the proposed rule effectively implement the requirement that a banking entity comply with the limitations on an investment in a single covered fund? If not, what alternative approach would be more effective and why?

Question 260. Does the proposed rule effectively implement the requirement that a banking entity comply with the limitations on the aggregate of all investments in all covered funds? If not, what alternative approach would be more effective and why?

Question 261. Is the proposed rule's approach to calculating a banking entity's investment in a covered fund effective? Should the per-fund calculation be based on committed capital, rather than invested capital? Why or why not? Is the timing of the calculation of a banking entity's ownership interest in a single covered fund appropriate? If not, why not, and what alternative approach would be more effective and why? For example, should the per-fund calculation be required on a less-frequent basis (e.g., monthly) for funds that compute their value and allow purchases and redemptions on a daily basis (e.g., daily)? Why or why not?

company); 12 CFR part 3, Appendices A, B, and C (for a national bank); 12 CFR part 325, Appendices A, C, and D (for a state nonmember bank); and 12 CFR part 167, Appendix C (for a federal thrift).

[286] 12 U.S.C. 1851(d)(4)(C).

[287] *See id.*

[288] As noted in Part III.C.2.a.ii of this Supplementary Information, the Agencies recognize the potential for evasion of the restrictions contained in section 13 of the BHC Act through organizing and offering a covered fund pursuant to the authority contained in § __.11 of the proposed rule. Therefore, in addition to taking action against a banking entity that does not actively seek unaffiliated investors to reduce or dilute the investment of the banking entity as provided under § __.12(a)(2) of the proposed rule, the Agencies expect that if a banking entity is habitually or routinely seeking an extension of the one-year period provided under § __.12(a)(2)(i)(B), this could be evidence of seeking to evade the restrictions contained in the proposed rule and, as appropriate, the Agencies may take action against such banking entity.

[289] *See* proposed rule § __.12(e)(1)(ii).

[290] Nothing in section 13 of the BHC Act or the proposed rule limits or otherwise affects the authority that the Board, the other Federal banking agencies, the SEC, or the CFTC may have under other provisions of law. In the case of the Board, these authorities include, but are not limited to, section 8 of the Federal Deposit Insurance Act and section 8 of the BHC Act. *See* 12 U.S.C. 1818, 1847.

[291] *See* proposed rule §§ __.12(e)(iii) and (iv).

Question 262. Is the proposed rule's approach to parallel investments effective? Why or why not? Should this provision require a contractual obligation and/or knowing participation? Why or why not? How else could the proposed rule define parallel investments? What characteristics would more closely achieve the scope and intended purposes of section 13 of the BHC Act?

Question 263. Is the proposed rule's treatment of investments in a covered fund by employees and directors of a banking entity effective? If not, what alternative approach would be more effective and why?

Question 264. Is the proposed rule's approach to differentiating between controlled and noncontrolled investments in a covered fund unduly complex or burdensome? If so, what alternative approach, if any, would be more effective and why?

Question 265. Is the proposed rule's approach to valuing an investment in a covered fund according to the same standards utilized by the covered fund for determining the aggregate value of its assets and ownership interests effective? If not, what alternative valuation approach would be more effective and why? Should the rule specify one methodology for valuing an investment in a covered fund?

Question 266. Is the proposed rule's approach regarding when to require the calculation of a banking entity's aggregate investments in all covered funds effective? What is the potential impact of calculating a banking entity's aggregate investment limit under the proposed rule on a quarterly basis as opposed to solely at the time an investment in a covered fund is made? Would calculation of the aggregate investment limit solely at the time an investment in a covered fund is made be consistent with the language and purpose of the statute? Does the proposed rule provide sufficient guidance for an issuer of asset-backed securities about how and when to make such calculation? Why or why not?

Question 267. Is the proposed rule's approach to determining and calculating a banking entity's relevant tier 1 capital limit effective? If not, what alternative approach would be more effective and why? With respect to applying the aggregate funds limitation to a banking entity that is not affiliated with an entity that is required to hold and report tier 1 capital, is total shareholder equity on a consolidated basis as of the last day of the most recent calendar quarter that has ended an effective proxy for tier 1 capital? If not, what alternative approach would be more effective and why?

Question *268.* Should the proposed rule be modified to permit a banking entity to bring its investments in covered funds into compliance with the proposed rule within a reasonable period of time if, for example, the banking entity's aggregate permitted investments in covered funds exceeds 3 percent of its tier 1 capital for reasons unrelated to additional investments (e.g., a banking entity's tier 1 capital decreases)? Why or why not?

Question 269. Does the proposed rule effectively and appropriately implement the deduction from capital for an investment in a covered fund contained in section 13(d)(4)(B)(iii) of the BHC Act? If not, what alternative approach would be more effective or appropriate, given the statutory language of the BHC Act and overall structure of section 13(d)(4), and why? What effect, if any, should the Agencies give to the cross-reference in section 13(d)(4) to section 13(d)(3) of the BHC Act, which provides Agencies with discretion to require additional capital, if appropriate, to protect the safety and soundness of banking entities engaged in activities permitted under section 13 of the BHC Act? How, if at all, should a banking entity's deduction of its investment in a covered fund be increased commensurate with the leverage of the covered fund? Should the amount of the deduction be proportionate to the leverage of the covered fund? For example, instead of a dollar-for-dollar deduction, should the deduction be set equal to the banking entity's investment in the covered fund times the difference between 1 and the covered fund's equity-to-assets ratio?

Question 270. Does the proposed rule effectively implement the Board's statutory authority to grant an extension of the period of time a banking entity may retain in excess of 3 percent of the ownership interests in a single covered fund? Are the enumerated factors that the Board may consider in connection with reviewing such an extension appropriate (including factors related to the effect of an extension of the covered fund), and if not, why not? Are there additional factors that the Board should consider in reviewing such a request? Are there specific additional conditions or limitations that the Board should, by rule, impose in connection with granting such an extension? If so, what conditions or limitations would be more effective?

Question 271. Given that the statute does not provide for an extension of time for a banking entity to comply with the aggregate funds limitation, within what period of time should a banking entity be required to bring its investments into conformance with the aggregate funds limit? Should the proposed rule expressly contain a grace period for complying with these limits? Why or why not? If yes, what grace period would be most effective and why?

Question 272. Does the proposed rule effectively implement the prohibition on a banking entity guaranteeing or insuring the obligations or performance of certain covered funds? If not, what alternative approach would be more effective and why?

Question 273. In the context of securitization transactions, control and ownership are often completely separated. Is additional guidance necessary with respect to how control should be determined with respect to issuers of asset-backed securities for purposes of determining the calculation of the per-fund and aggregate ownership limitations?

Question 274. In many securitization transactions, the voting rights of investors are extremely limited and management may be contractually delegated to a third party (because issuers of asset-backed securities rarely have a board with any authority or any employees). The servicer or manager has the ''ability to control the decision-making and operational functions of the fund.'' When calculating the per-fund and aggregate ownership limitations, to whom should the proposed rule allocate ''control'' in this type of situation? Which participants in a securitization transaction would need to include the activities of an issuer of asset-backed securities in their calculations of per-fund and aggregate ownership, and what is the potential impact of such inclusion?

Question 275. For purposes of calculating the per-fund and aggregate ownership limitations, how should the proposed rule address those instances in which equity is issued, but the equity holder does not receive economic benefits or have any control rights? For instance, in order to enhance or achieve bankruptcy remoteness, a single purpose trust without an owner (i.e, an orphan trust) may hold all of the equity interests in a securitization vehicle. Such interests often do not have any meaningful economic or control rights.

4. Section __.13: Other Permitted Covered Fund Activities and Investments

Section 13 of the proposed rule implements the statutory exemptions described in sections 13(d)(1)(C), (E), and (I) of the BHC Act that permit a

banking entity: (i) To acquire an ownership interest in, or act as sponsor to, one or more SBICs, a public welfare investment, or a certain qualified rehabilitation expenditure; [292] (ii) to acquire or retain an ownership interest in a covered fund as a risk-mitigating hedging position; and (iii) in the case of a non-U.S. banking entity, to acquire or retain an ownership interest in or sponsor a foreign covered fund. Additionally, § __.13 of the proposed rule implements in part the rule of construction related to the sale and securitization of loans contained in section 13(g)(2) of the BHC Act. Similar to § __.6 of the proposed rule (which implements certain permitted proprietary trading activities), § __.13 contains only the statutory exemptions contained in section 13(d)(1) of the BHC Act that the Agencies have determined apply, either by plain language or by implication, to investments in or relationships with a covered fund.[293]

a. Permitted Investments in SBICs and Related Funds

Section __.13(a) of the proposed rule implements sections 13(d)(1)(E) and (J) of the BHC Act [294] and permits a banking entity to acquire or retain any ownership interest in, or act as sponsor to: (i) One or more SBICs, as defined in section 102 of the Small Business Investment Act of 1958 (12 U.S.C. § 662); (ii) an investment that is designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. § 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs); and (iii) an investment that is a qualified rehabilitation expenditure with respect to a qualified rehabilitation building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.[295] Since section 13(d)(1)(E) of the BHC Act does not limit a banking entity's investment to a limited partnership or other non-controlling investment, § __.13(a) of the proposed rule would permit a banking entity to be a shareholder, general partner, managing member, or trustee of an SBIC without regard to whether the interest is a controlling or non-controlling interest.[296]

In addition to the acquisition or retention of an ownership interest, permitting a banking entity to act as sponsor to these types of public interest investments will provide valuable expertise and services to these types of entities, as well as help enable banking entities to provide valuable funding and assistance to small business and low- and moderate-income communities. Therefore, the Agencies believe this exemption would be consistent with the safe and sound operation of banking entities, and would also promote the financial stability of the United States.

The Agencies request comment on the proposed rule's approach to implementing the exemption for permitted investments in and relationships with SBICs and certain related funds. In particular, the Agencies request comment on the following questions:

Question 276. Is the proposed rule's approach to implementing the SBIC, public welfare and qualified rehabilitation investment exemption for acquiring or retaining an ownership interest in a covered fund effective? If not, what alternative approach would be more effective?

Question 277. Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 278. Should the proposed rule permit a banking entity to sponsor an SBIC and other identified public interest investments? Why or why not? Does the Agencies' determination under section 13(d)(1)(J) of the BHC Act regarding sponsoring of an SBIC, public welfare or qualified rehabilitation investment effectively promote and protect the safety and soundness of banking entities and the financial stability of the United States? If not, why not?

Question 279. What would the effect of the proposed rule be on a banking entity's ability to sponsor and syndicate funds supported by public welfare investments or low income housing tax credits which are utilized to assist banks and other insured depository institutions with meeting their Community Reinvestment Act (''CRA'') obligations?

Question 280. Does the proposed rule unduly constrain a banking entity's ability to meet the convenience and needs of the community through CRA or other public welfare investments or services? If so, why and how could the proposed rule be revised to address this concern?

b. Permitted Risk-Mitigating Hedging Activities

Section __.13(b) of the proposed rule permits a banking entity to acquire and retain an ownership interest in a covered fund if the transaction is made in connection with, and related to, certain individual or aggregated positions, contracts, or other holdings of the banking entity and is designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings. This section of the proposed rule implements, in relevant part, section 13(d)(1)(C) of the BHC Act, which provides an exemption from the prohibition on acquiring or retaining an ownership interest in a covered fund for certain risk-mitigating hedging activities.[297]

Interests by a banking entity in a covered fund may not typically be used as hedges for specific positions, contracts, or other holdings of a banking entity. However, two situations where a banking entity may potentially acquire or retain an ownership interest in a covered fund as a hedge are (i) when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund (similar to acting as a ''riskless principal''),[298] and (ii) to cover

[292] Section __.13(a) of the proposed rule also implements a proposed determination by the Agencies under section 13(d)(1)(J) of the BHC Act that a banking entity may not only invest in such entities as provided under section 13(d)(1)(E) of the BHC Act, but also may sponsor an entity described in that paragraph and that such activity, since it generally would facilitate investment in small businesses and support the public welfare, would promote and protect the safety and soundness of banking entities and the financial stability of the United States.

[293] In particular, § __.13 of the proposed rule does not include: (i) The exemption in section 13(d)(1)(A) of the BHC Act for trading in certain permitted government obligations; (ii) the exemption in section 13(d)(1)(H) of the BHC Act for certain foreign proprietary trading activities; and (iii) the exemption contained in section 13(d)(1)(B) of the BHC Act related to underwriting and market-making related activities. Each of these exemptions appear relevant only to covered trading activities and not to covered fund activities.

[294] Section 13(d)(1)(E) of the BHC Act permits a banking entity to make investments in one or more SBICs, investments designed primarily to promote the public welfare, investments of the type permitted under 12 U.S.C. 24(eleventh), and investments that are qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure. *See* 12 U.S.C. 1851(d)(1)(E).

[295] *See* proposed rule § __.13(a).

[296] Pursuant to the exemption contained in § __.13(a) of the proposed rule, a banking entity may acquire an ownership interest in, or act as sponsor to, a low income housing credit fund, if such fund qualifies as an SBIC, public welfare investment or qualified rehabilitation expenditure.

[297] *See* 12 U.S.C. 1851(d)(1)(C).

[298] In order to prevent evasion of the general limitation that a banking entity may not acquire or retain more than 3 percent of the ownership interests in any single covered fund that such banking entity organizes and offers, the proposed rule limits a banking entity's ability to acquire or retain an ownership interest in a covered fund as

a compensation arrangement with an employee of the banking entity that directly provides investment advisory or other services to that fund. Section __.13(b) of the proposed rule provides an exemption for banking entity to acquire or retain an ownership interest in a covered fund in these limited situations.[299]

i. Approach for Hedges Using an Ownership Interest in a Covered Fund

As noted above in the discussion of § __.5 of the proposed rule, risk-mitigating hedging activities present certain implementation challenges because of the potential that prohibited activities or investments could be conducted in the context of, or mischaracterized as, hedging transactions. In light of these complexities, the Agencies have proposed a multi-faceted approach to implementation, which is discussed in detail above in reference to § __.5 of the proposed rule.[300] As with the hedging exemption provided under § __.5, this multi-faceted approach is intended to clearly articulate the Agencies' expectations regarding the scope of permitted hedging activities under § __.13(b) in a manner that limits potential abuse of the hedging exemption while not unduly constraining the important risk management function that is served by a banking entity's hedging activities. However, because of the possibility that using an ownership interest in a covered fund as a hedging instrument may mask an intent to evade the limitations on the amount and value of ownership interests in a covered fund or funds under § __.12, the proposed rule contains several additional requirements related to a banking entity's ability to use an ownership interest in a covered fund as a hedging instrument.

ii. Required Criteria for Permitted Risk-Mitigating Hedging Activities Involving a Covered Fund

Section __.13(b) of the proposed rule describes the criteria that a banking entity must meet in order to rely on the hedging exemption with respect to ownership interests of a covered fund. The majority of these requirements are substantially similar to those discussed in detail above in connection with the risk-mitigating hedging exemption contained in § __.5 of the proposed rule, and include the requirements that: (i) The hedge is made in connection with and related to individual or aggregated obligations or liabilities of the banking entity that are: (A) taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund, or (B) directly connected to a compensation arrangement with an employee that directly provides investment advisory or other services to the covered fund; (ii) the banking entity has established the internal compliance program required by subpart D designed to ensure the banking entity's compliance with the requirements of this paragraph, including reasonably designed written policies and procedures regarding the instruments, techniques and strategies that may be used for hedging, internal controls and monitoring procedures, and independent testing; (iii) the transaction is designed to reduce the specific risks to the banking entity in connection with and related to such obligations or liabilities; (iv) the acquisition or retention of an ownership interest in a covered fund: (A) Is made in accordance with the written policies, procedures and internal controls established by the banking entity pursuant to subpart D; (B) hedges or otherwise mitigates an exposure to a covered fund through a substantially similar offsetting exposure to the same covered fund and in the same amount of ownership interest in that covered fund that arises out of a transaction conducted solely to accommodate a specific customer request with respect to, or directly connected to its compensation arrangement with an employee that directly provides investment advisory or other services to, that covered fund; (C) does not give rise, at the inception of the hedge, to significant exposures that were not already present in individual or aggregated positions, contracts, or other holdings of a banking entity and are not hedged contemporaneously; and (D) is subject to continuing review, monitoring and management by the banking entity that: (1) Is consistent with its written hedging policies and procedures; (2) maintains a substantially similar offsetting exposure to the same amount and type of ownership interest, based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks the purchase or sale is intended to hedge or otherwise mitigate; and (3) mitigates any significant exposure arising out of the hedge after inception; and (v) the compensation arrangements of persons performing the risk-mitigating hedging activities are designed not to reward proprietary risk-taking.[301]

These requirements, while substantially similar to those contained in § __.5 above, are different in several material aspects. First, § __.13(b)(1)(i) of the proposed rule provides that any banking entity relying on this exemption may only hedge or otherwise mitigate one or more specific risks arising in connection with and related to the two situations enumerated in that section. These are risks taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund, or directly connected to its compensation arrangement with an employee that directly provides investment advisory or other services to the covered fund.[302] Second, § __.13(b)(2)(ii)(B) of the proposed rule requires that the acquisition or retention of an ownership interest in a covered fund hedge or otherwise mitigate a substantially similar offsetting exposure to the same covered fund and in the same amount of ownership interest in that covered fund, which requires greater equivalency between the reference asset and hedging instrument than the correlation required under § __.5. Third, § __.13(b)(3) of the proposed rule imposes a documentation requirement on all types of hedging transactions where the banking entity uses ownership interests in a covered fund as the hedging instrument. This requirement is broader than that contained in § __.5 and is reflective of the limited scope of positions or exposures for which a banking entity may acquire or retain an ownership interest in a covered fund as a hedge. Specifically, for *any* transaction that a banking entity acquires or retains an ownership interest in a covered fund in reliance of the hedging exemption, the banking entity must document the risk-mitigating purposes of the transaction and identify the risks of the individual or aggregated positions, contracts, or other holding of the banking entity that the transaction is designed to reduce. Such documentation must be established at the time the hedging transaction is effected, not after the fact. This documentation requirement establishes a contemporaneous record that will assist the Agencies in assessing

a permitted risk-mitigating hedge to those situations where the customer of the banking entity is not itself a banking entity. *See* proposed rule § __.13(b)(1)(i)(A).

[299] *See* proposed rule § __.13(b).

[300] *See* Supplementary Information, Part III.B.3.

[301] *See* proposed rule § __.13(b).

[302] *See* proposed rule § __.13(b)(1)(i).

the actual reasons for which the position was established.

iv. Request for Comment

In addition to those questions raised in connection with the proposed implementation of the risk-mitigating hedging exemption under § __.5 of the proposed rule, the Agencies request comment on the proposed implementation of that same exemption with respect to covered fund activities. In particular, the Agencies request comment on the following questions:

Question 281. Is the proposed rule's approach to implementing the hedging exemption for acquiring or retaining an ownership interest in a covered fund effective? If not, what alternative approach would be more effective?

Question 282. Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 283. What burden will the proposed approach to implementing the hedging exemption have on banking entities? How can any burden be minimized or eliminated in a manner consistent with the language and purpose of the statute?

Question 284. Are the criteria included in § __.13(b)'s hedging exemption effective? Is the application of each criterion to potential transactions sufficiently clear? Should any of the criteria be changed or eliminated? Should other requirements be added?

Question 285. Is the requirement that an ownership interest in a covered fund may only be used as a hedge (i) by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund, or (ii) to cover compensation arrangements with an employee of the banking entity that directly provides investment advisory or other services to that fund effective? If not, what other requirements would be more effective?

Question 286. Does the proposed rule sufficiently articulate the types of risks and positions that a banking entity typically would utilize an ownership interest in a covered fund to hedge? If not, how should the proposal be changed?

Question 287. Is the requirement that that the hedging transaction involve a substantially similar offsetting exposure to the same covered fund and in the same amount of ownership interest to the risk or risks the transaction is intended to hedge or otherwise mitigate effective? If not, how should the requirement be changed? Should some other level of correlation be required? Should the proposal specify in greater detail how correlation should be measured? If not, how could it better do so?

Question 288. Is the requirement that the transaction not give rise, at the inception of the hedge, to material risks that are not themselves hedged in a contemporaneous transaction effective? Is the proposed materiality qualifier appropriate and sufficiently clear? If not, what alternative would be effective and/or clearer?

Question 289. Is the requirement that any transaction conducted in reliance on the hedging exemption be subject to continuing review, monitoring and management after the transaction is established effective? If not, what alternative would be more effective?

Question 290. Is the proposed documentation requirement effective? If not, what alternative would be more effective? What burden would the proposed documentation requirement place on covered banking entities? How might such burden be reduced or eliminated in a manner consistent with the language and purpose of the statute?

c. Permitted Covered Fund Activities and Investments Outside of the United States

Section __.13(c) of the proposed rule, which implements section 13(d)(1)(I) of the BHC Act,[303] permits certain foreign banking entities to acquire or retain an ownership interest in, or to act as sponsor to, a covered fund so long as such activity occurs solely outside of the United States and the entity meets the requirements of sections 4(c)(9) or 4(c)(13) of the BHC Act. The purpose of this statutory exemption appears to be to limit the extraterritorial application of the statutory restrictions on covered fund activities to foreign firms that, in the course of operating outside of the United States, engage outside the United States in activities permitted under relevant foreign law, while preserving national treatment and competitive equality among U.S. and foreign firms within the United States.[304] Consistent with this purpose, the proposed rule defines both the type of foreign banking entities that are eligible for the exemption and the circumstances in which covered fund activities or investments by such an entity will be considered to have occurred solely outside of the United States (including clarifying when an ownership interest will be deemed to have been offered for sale or sold to a resident of the United States).

i. Foreign Banking Entities Eligible for the Exemption

Section __.13(c)(1)(i) of the proposed rule incorporates the statutory requirement that the banking entity not be, directly or indirectly, controlled by a banking entity that is organized under the laws of the United States or of one or more States. Consistent with the statutory language, banking entities organized under the laws of the United States or of one or more States, or the subsidiaries or branches thereof (wherever organized or licensed), may not rely on the exemption. Similarly, the U.S. subsidiaries or U.S. branches of foreign banking entities would not qualify for the exemption.

Section __.13(c)(2) clarifies when a banking entity would be considered to have met the statutory requirement that the banking entity conduct the activity pursuant to paragraphs 4(c)(9) or 4(c)(13) of the BHC Act [305] Section 4(c)(9) of the BHC Act generally provides that the restrictions on nonbanking activities contained in section 4(a) of that statute do not apply to the ownership of shares held or activities conducted by any company organized under the laws of a foreign country the greater part of whose business is conducted outside the United States, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the exemption would not be substantially at variance with the purposes of this Act and would be in

[303] Section 13(d)(1)(I) of the BHC Act permits a banking entity to acquire or retain an ownership interest in, or have certain relationships with, a covered fund notwithstanding the prohibition on proprietary trading and restrictions on investments in, and relationships with, a covered fund, if: (i) such activity or investment is conducted by a banking entity pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act; (ii) the activity occurs solely outside of the United States; (iii) no ownership interest in such fund is offered for sale or sold to a resident of the United States; and (iv) the banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States. *See* 12 U.S.C. 1851(d)(1)(I).

[304] *See* 156 Cong. Rec. S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley).

[305] Section __.13(c)(2) of the proposed rule only addresses when a transaction or activity will be considered to have been conducted pursuant to section 4(c)(9) of the BHC Act; although the statute also references section 4(c)(13) of the BHC Act, the Board has applied the authority contained in that section only to include certain foreign activities of U.S. banking organizations. The express language of section 13(d)(1)(I) of the BHC Act limits its availability to foreign banking entities that are not controlled by a banking entity organized under the laws of the United States or of one or more states. A foreign banking entity may not rely on the exemptive authority of section 4(c)(13) and, so, that section is not addressed in the proposed rule.

the public interest.[306] The Board has, in part, implemented section 4(c)(9) through subpart B of the Board's Regulation K, which specifies a number of conditions and requirements that a foreign banking organization must meet in order to use such authority. Such conditions and requirements include, for example, a qualifying foreign banking organization test that requires the foreign banking organization to demonstrate that more than half of its worldwide business is banking and that more than half of its banking business is outside the United States.

The proposed rule makes clear that a banking entity will qualify for the foreign fund exemption if the entity is a foreign banking organization subject to subpart B of the Board's Regulation K and the transaction occurs solely outside the United States. Section 13 of the BHC Act also applies to foreign companies that are banking entities covered by Section 13 but are not currently subject either to the BHC Act generally or the Board's Regulation K, for example, because the foreign company controls a savings association or an FDIC-insured industrial loan company but not a bank or branch in the United States. Accordingly, the proposed rule clarifies when such a foreign banking entity would be considered to have conducted a transaction or activity ''pursuant to section 4(c)(9)'' for purposes of the exemption at § __.13(c) of the proposed rule.[307] In particular, the proposed rule proposes that to qualify for the foreign banking entity exemption, such firms must meet at least two of three requirements that evaluate the extent to which the foreign entity's business is conducted outside the United States, as measured by assets, revenues, and income. This test largely mirrors the qualifying foreign banking organization test that is made applicable under section 4(c)(9) and § 211.23(a) of the Board's Regulation K, except that the relevant test under § __.13(c)(2)(ii) of the proposed rule does not require such a foreign entity to demonstrate that more than half of its business is banking conducted outside the United States.[308]

ii. Transactions and Activities Solely Outside of the United States

Section __.13(c) of the proposed rule also clarifies when a transaction or activity will be considered to have occurred solely outside of the Unites States for purposes of the exemption. In interpreting this aspect of the statutory language, the proposal focuses on the extent to which material elements of the transaction occur within, or are effected by personnel within, the United States. This aspect of the proposal reflects the apparent intent of the foreign funds exemption to avoid extraterritorial application of the restrictions on covered funds activities and investments outside the United States while preserving competitive parity within U.S. market. The proposed rule does not evaluate solely whether the risk of the transaction or activity, or management or decision-making with respect to such transaction or activity, rests outside the United States. Rather, the proposal also provides that foreign banking entities may not structure a transaction or activity so as to be ''outside of the United States'' for risk and booking purposes while simultaneously engaging in transactions within U.S. markets that are prohibited for U.S. banking entities.

In particular, § __.13(c)(3) of the proposed rule provides that a transaction or activity will be considered to have occurred solely outside of the United States only if all of the following three conditions are satisfied:

- The transaction or activity is conducted by a banking entity that is not organized under the laws of the United States or of one or more States;
- No subsidiary, affiliate, or employee of the banking entity that is involved in the offer or sale of an ownership interest in the covered fund is incorporated or physically located in the United States; and
- No ownership interest in such covered fund is offered for sale or sold to a resident of the United States.

These three criteria reflect statutory constraints and are intended to ensure that a transaction or activity conducted in reliance on the exemption does not involve either investors that are residents of the United States or a relevant U.S. employee of the banking entity, as such involvement would appear to constitute a sufficient locus of activity in the U.S. marketplace so as to preclude the availability of the exemption.

A resident of the United States is defined in § __.2(t) of the proposed rule, and is described in detail in Part III.B.4.d of this Supplementary Information. The proposed rule applies this definition in the context of the foreign covered funds exemption because it would appear to appropriately capture the scope of counterparties (including investors that are residents of the United States) or relevant U.S. personnel of the banking entity, that, if involved in the transaction or activity, would preclude such transaction or activity from being considered to have occurred solely outside the United States. Under the proposed rule, an employee or entity engaged in the offer or sale of an ownership interest (or booking such transaction) must be outside of the United States; however, an employee or entity with no customer relationship and involved solely in providing administrative services or so-called ''back office'' functions to the fund as incident to the activity permitted under § __.13(c) of the proposed rule (such as clearing and settlement or maintaining and preserving records of the fund with respect to a transaction where no ownership interest is offered for sale or sold to a resident of the United States) would not be subject to this requirement.

iii. Request for Comment

The Agencies request comment on the proposed rule's approach to implementing the foreign covered funds activity and investment exemption. In particular, the Agencies request comment on the following questions:

Question 291. Is the proposed rule's implementation of the ''foreign funds'' exemption effective? If not, what alternative would be more effective and/or clearer?

Question 292. Are the proposed rule's provisions regarding when an activity will be considered to be conducted pursuant to section 4(c)(9) of the BHC Act effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Does it effectively address application of the foreign funds exemption to foreign banking entities not subject to the BHC Act generally? If not, how could it better address application of the exemption?

Question 293. Are the proposed rule's provisions regarding when a transaction or activity will be considered to have occurred solely outside the United States effective and sufficiently clear? If not, what alternative would be more

[306] *See* 12 U.S.C. 1843(c)(9).

[307] The Board emphasizes that this clarification would be applicable *solely in the context of sections 13(d)(1)(H) and (I) of the BHC Act.* The application of section 4(c)(9) to such foreign companies in other contexts is likely to involve different legal and policy issues and may therefore merit different approaches.

[308] *See* 12 U.S.C. 1843(c)(9); 12 CFR 211.23(a); proposed rule § __.13(c)(2). This difference reflects the fact that foreign entities subject to section 13 of the BHC Act but not the BHC Act are, in many cases, predominantly commercial firms. A requirement that a firm also demonstrate that more than half of its banking business is outside the United States would likely make the exemption unavailable to many such firms and subject their global activities to the prohibition on acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund, a result that the statute does not appear to have intended.

effective and/or clearer? Should additional requirements be added? If so, what requirements and why? Should additional requirements be modified or removed? If so, what requirements and why or how?

Question 294. Is the proposed exemption consistent with the purpose of the statute? Is the proposed exemption consistent with respect to national treatment for foreign banking organizations? Is the proposed exemption consistent with the concept of competitive equity?

Question 295. Does the proposed rule effectively define a resident of the United States for these purposes? If not, how should the definition be altered? What definitions of resident of the United States are currently used by banking entities? Would using any one of these definitions reduce the burden of complying with section 13 of the BHC Act? Why or why not?

d. Sale and Securitization of Loans

Section __.13(d) of the proposed rule permits a banking entity to acquire and retain an ownership interest in a covered fund that is an issuer of asset-backed securities, the assets or holdings of which are solely comprised of: (i) Loans; (ii) contractual rights or assets directly arising from those loans supporting the asset-backed securities; and (iii) interest rate or foreign exchange derivatives that (A) materially relate to the terms of such loans or contractual rights or assets and (B) are used for hedging purposes with respect to the securitization structure.[309] The authority contained in this section of the proposed rule would therefore allow a banking entity to engage in the sale and securitization of loans by acquiring and retaining an ownership interest in certain securitization vehicles (which could qualify as a covered fund for purposes of section 13(h)(2) of the BHC Act and the proposed rule) that the banking entity organizes and offers, or acts as sponsor to, in excess of and without being subject to the limitations contained in § __.12 of the proposed rule. Proposed § __.13(d) is designed to assist in implementing section 13(g)(2) of the BHC Act, which provides that nothing in section 13 of the BHC Act shall be construed to limit or restrict the ability of a banking entity or nonbank financial company supervised by the Board to sell or securitize loans in a manner otherwise permitted by law.[310]

The Agencies note that the phrase ''materially relate to terms of such loans'' is intended to quantitatively limit the derivatives permitted in a ''securitization of loans'' under § __.13(d) of the proposed rule to include only those derivatives where the notional amount of the derivative is tied to the outstanding principal balance of the loans supporting the asset-backed securities of such issuer, either individually or in the aggregate. Additionally, such derivatives must be used solely to hedge risks that result from a mismatch between the loans and the related asset-backed securities (e.g., fixed rate loans with floating rate asset-backed securities, loans tied to the Prime Rate with LIBOR asset-backed securities, or Euro-denominated loans with Dollar-denominated asset-backed securities). Therefore, § __.13(d)(3) of the proposed rule would not allow the use of a credit default swap by an issuer of asset-backed securities.

The Agencies request comment on the proposed rule's approach to implementing the rule of construction related to the sale and securitization of loans. In particular, the Agencies request comment on the following questions:

Question 296. Is the proposed rule's implementation of the statute's ''sale and securitization of loans'' rule of construction effective? If not, what alternative would be more effective and/or clearer?

Question 297. Are there other entities or activities that should be included in the proposed rule's implementation of the rule of construction related to the sale and securitization of loans? If so, what entity or activity and why?

Question 298. Is the proposed rule's application of the rule of construction contained in section 13(g)(2) of the BHC Act appropriate?

Question 299. Are the proposed rule and this Supplementary Information sufficiently clear regarding which derivatives would be allowed in a ''securitization of loans'' under § __.13(d)(3) of the proposed rule? Is additional guidance necessary with respect to the types of derivatives that would be included in or excluded from a securitization of loans for purposes of interpreting the rule of construction contained in section 13(g)(2) of the BHC Act? If so, what topics should the additional guidance discuss and why?

Question 300. Should derivatives other than interest rate or foreign exchange derivatives be allowed in a ''securitization of loans'' for purposes of interpreting the rule of construction contained in section 13(g)(2) of the BHC Act? Why or why not? What would be the legal and economic impact of not allowing the use of derivatives other than interest rate or foreign exchange derivatives in a ''securitization of loans'' under § __.13(d)(3) of the proposed rule for existing issuers of asset-backed securities and for future issuers of asset-backed securities?

Question 301. Should the Agencies consider providing additional guidance for when a transaction with intermediate steps constitutes one or more securitization transactions that each would be subject to the rule? For example, both auto lease securitizations and asset-backed commercial paper conduits typically involve intermediate securitizations. The asset-backed securities issued to investors in such covered funds are technically supported by the intermediate asset-backed securities. Should these kinds of securitizations be viewed as a single transaction and included within a securitization of loans for purposes of the proposed rule? Should each step be viewed as a separate securitization?

5. Section __.14: Covered Fund Activities and Investments Determined To Be Permissible

Section __.14 of the proposed rule, which implements section 13(d)(1)(J) of the BHC Act,[311] permits a banking entity to engage in any covered funds activity that the Agencies determine promotes and protects the safety and soundness of a banking entity and the financial stability of the United States.[312] Any activity authorized under § __.14 of the proposed rule must still comply with the prohibition and limitations governing relationships with covered funds contained in section 13(f) of the BHC Act, as implemented by § __.16 of this proposal.[313] Additionally,

[309] *See* proposed rule § __.13(d). The types of derivatives permitted under § __.13(d)(3) of the proposed rule are not meant to include a synthetic securitization or a securitization of derivatives, but rather to include those derivatives that are used to hedge foreign exchange or interest rate risk resulting from loans held by the issuer of asset-backed securities.

[310] *See* 12 U.S.C. 1851(g)(2).

[311] Section 13(d)(1)(J) of the BHC Act provides the Agencies discretion to determine that other activities not specifically identified by sections 13(d)(1)(A)–(I) of the BHC Act are exempted from the general prohibitions contained in section 13(a) of that Act, and are thus permitted activities. In order to make such a determination, the Agencies must find that such activity or activities promote and protect the safety and soundness of a banking entity, as well as promote and protect the financial stability of the United States. *See* 12 U.S.C. 1851(d)(1)(J).

[312] *See* 12 U.S.C. 1851(d)(1)(J).

[313] Section 13(d)(1)(J) of the BHC Act only provides the Agencies with the ability to provide additional exemptions from the prohibitions contained in section 13(a)(1) of the BHC Act. Section 13(f) of the BHC Act, which deals with relationships and transactions with a fund that is, directly or indirectly, organized and offered or sponsored by a banking entity, operates as an independent prohibition and set of limitations on

like other activities permissible under section 13(d)(1) of the BHC Act and as implemented by subpart C of the proposed rule, activities found permissible under § __.14 of the proposed rule and section 13(d)(1)(J) remain subject to other provisions of section 13 of the BHC Act, including the sections limiting conflicts of interest and high-risk assets or trading strategies, as well as the section designed to prevent evasion of section 13 of the BHC Act.[314]

The Agencies have proposed to permit three activities at this time under this authority. These activities involve acquiring or retaining an ownership interest in and sponsoring of (i) certain BOLI separate accounts; (ii) certain entities that, although within the definition of covered fund are, in fact, common corporate organizational vehicles; and (iii) a covered fund in the ordinary course of collecting a debt previously contracted in good faith or pursuant to and in compliance with the conformance or extended transition period provided for under the Board's rules issued under section 13(c)(6) of the BHC Act.

a. Investments in Certain Bank Owned Life Insurance Separate Accounts

Banking entities have for many years invested in life insurance policies that cover key employees, in accordance with supervisory policies established by the Federal banking agencies.[315] These BOLI investments are typically structured as investments in separate accounts that are excluded from the definition of ''investment company'' under the Investment Company Act by virtue of section 3(c)(1) or 3(c)(7) of that Act. By virtue of reliance on these exclusions, these BOLI accounts would be covered by the definition of ''hedge fund'' or ''private equity fund'' in section 13 of the BHC Act.[316]

However, when made in the normal course, these investments do not involve the speculative risks intended to be addressed by section 13 of the BHC Act. Moreover, applying the prohibitions in section 13 to these investments would eliminate an investment that helps banking entities to reduce their costs of providing employee benefits as well as other costs.

Section __.14(a)(1) of the proposed rule permits a banking entity to acquire and retain these BOLI investments, as well as act as sponsor to a BOLI separate account.[317] The proposal includes a number of conditions designed to ensure that BOLI investments are not conducted in a manner that raises the concerns that section 13 of the BHC Act is intended to address. In particular, in order for a banking entity to invest in or sponsor a BOLI separate account, the banking entity that purchases the insurance policy: (i) May not control the investment decisions regarding the underlying assets or holdings of the separate account; and (ii) must hold its ownership interests in the separate account in compliance with applicable supervisory guidance provided by the appropriate Federal regulatory agency regarding BOLI.[318]

The Agencies have structured this exemption in the proposed rule so as to allow a banking entity to continue to manage and structure its risks and obligations related to its employee compensation or benefit plan obligations in a manner that promotes and protects the safety and soundness of banking entities, which on an industry-wide level has the concomitant effect of promoting and protecting the financial stability of the United States.

b. Investments in Certain Other Covered Funds

As noted above, the definition of ''covered fund'' as contained in § __.10(b)(1) of the proposed rule potentially includes within its scope many entities and corporate structures that would not usually be thought of as a ''hedge fund'' or ''private equity fund.'' Additionally, the Dodd-Frank Act contains other provisions that permit or require a banking entity to acquire or retain an ownership interest in or act as sponsor to a covered fund in a manner not specifically described under section 13 of the BHC Act.

Section __.14(a)(2) of the proposed rule permits a banking entity to own certain specified entities that are often part of corporate structures and that, by themselves and without other extenuating circumstances or factors, do not raise the type of concerns which section 13 of the BHC Act was intended to address but which nevertheless may be captured by the definition of ''hedge fund'' or ''private equity fund'' in section 13(h)(2) of the BHC Act. Specifically, § __.14(a)(2) of the proposed rule permits a banking entity to acquire or retain an ownership interest in or act as sponsor to (i) a joint venture between the banking entity and any other person, provided that the joint venture is an operating company and does not engage in any activity or any investment not permitted under the proposed rule; (ii) an acquisition vehicle, provided that the sole purpose and effect of such entity is to effectuate a transaction involving the acquisition or merger of one entity with or into the banking entity or one of its affiliates; and (iii) a wholly-owned subsidiary of the banking entity that is (A) engaged principally in providing *bona fide* liquidity management services described under § __.3(b)(2)(iii)(C) of the proposed rule, and (B) carried on the balance sheet of the banking entity.[319]

The Agencies note that these types of entities may meet the definition of covered fund contained in § __.10(b)(1) of the proposed rule (and as contained in section 13(h)(2) of the BHC Act), to the extent these entities rely solely on section 3(c)(1) or 3(c)(7) of the Investment Company Act. However, these types of entities do not engage in the type and scope of activities to which Congress intended section 13 of the BHC Act to apply.[320] Additionally, without this exemption, many entities would be forced to alter their corporate structure without achieving any reduction in risk. Permitting such investments in these entities would thus appear to promote and protect the safety and soundness of banking entities and promote and protect the financial stability of the United States.

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the activities of banking entities. As such, § __.14 of the proposed rule cannot and does not provide any exemptions from the prohibition on relationships or transaction with a covered fund contained in section 13(f) of the BHC Act or § __.16 of the proposed rule.

[314] *See* 12 U.S.C. 1851(d)(2), (e)(1).

[315] *See, e.g.,* Bank Owned Life Insurance, Interagency Statement on the Purchase and Risk Management of Life Insurance (''Interagency BOLI Guidance'') (Dec. 7, 2004).

[316] *See* 12 U.S.C. 1851(h)(2).

[317] The proposed rule defines ''separate account'' as ''an account established and maintained by an insurance company subject to regulation by a State insurance regulatory or a foreign insurance regulator under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.'' *See* proposed rule § __.2(z).

[318] *See* proposed rule § __.14(a)(1)(i)–(ii). While other guidance or requirements may be imposed by the Agencies or an individual Agency for a specific banking entity for which it serves as the primary financial regulator, the Agencies note that, at a minimum, investments under authority of this section must comply with the Interagency BOLI Guidance. This guidance requires, among other things, that a banking entity generally: (i) Not control the investment decisions regarding the underlying assets or holdings of the separate account; (ii) demonstrate to the satisfaction of the relevant Agency that the potential returns from the investments in such separate account are appropriately matched to the banking entity's employee compensation or benefit plan obligations; and (iii) not use such separate account to take speculative positions or to support the general operations of the banking entity.

[319] *See* proposed rule § __.14(a)(2).

[320] *See* 156 Cong. Rec. H5226 (daily ed. June 30, 2010) (statement of Reps. Himes and Frank).

Section __.14(a)(2) of the proposed rule also permits a banking entity to comply with section 15G of the Exchange Act (15 U.S.C. 78o–11), added by section 941 of the Dodd-Frank Act, which requires a banking entity to maintain a certain minimum interest in certain sponsored or originated asset-backed securities.[321] In order to give effect to this separate requirement under the Dodd-Frank Act, § __.14(a)(2)(iii) of the proposed rule permits a banking entity to acquire or retain an ownership interest in or act as sponsor to an issuer of asset-backed securities, but only with respect to that amount or value of economic interest in a portion of the credit risk for an asset-backed security that is retained by a banking entity that is a ''securitizer'' or ''originator'' in compliance with the minimum requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and any implementing regulations issued thereunder.[322] The Agencies have structured this exemption to recognize that Congress imposed other requirements on firms that are banking entities under section 13 of the BHC Act. Additionally, permitting a banking entity to retain the minimum level of economic interest will incent banking entities to engage in more careful and prudent underwriting and evaluation of the risks and obligations that may accompany asset-backed securitizations, which would promote and protect the safety and soundness of banking entities and the financial stability of the United States.

Section 14(a)(2) of the proposed rule permits a banking entity to acquire and retain an ownership interest in a covered fund that is an issuer of asset-backed securities described in § 13(d) of the proposed rule, the assets or holdings of which are solely comprised of: (i) Loans; (ii) contractual rights or assets directly arising from those loans supporting the asset-backed securities; and (iii) interest rate or foreign exchange derivatives that (A) materially relate to the terms of such loans or contractual rights or assets and (B) are used for hedging purposes with respect to the securitization structure. This exemption augments the authority regarding the sale and securitization of loans available under § __.13(d) of the proposed rule (which partially implements the rule of construction under section 13(g)(2) of the BHC Act) and permits a banking entity to engage in the purchase, and not only the sale and securitization, of loans through authorizing the acquisition or retention of an ownership interest in such securitization vehicles that the banking entity does not organize and offer, or for which it does not act as sponsor, provided that the assets or holdings of such vehicles are solely comprised of the instruments or obligations referenced above.[323]

Permitting banking entities to acquire or retain an ownership interest in these loan securitizations will provide a deeper and richer pool of potential participants and a more liquid market for the sale of such securitizations, which in turn should result in increased availability of funds to individuals and small businesses, as well as provide greater efficiency and diversification of risk. The Agencies believe this exemption would promote and protect the safety and soundness of a banking entity, and would also promote and protect the financial stability of the United States.[324]

c. Acquiring or Retaining an Ownership Interest in or Acting a Sponsor to a Covered Fund Under Certain Specified Authorities

Section __.14(b) of the proposed rule permits a banking entity to acquire or retain an ownership interest in or act as sponsor to a covered fund in those instances where the ownership interest is acquired or retained by a banking entity (i) in the ordinary course of collecting a debt previously contracted in good faith, if the banking entity divests the ownership interest within applicable time periods provided for by the applicable Agency, or (ii) pursuant to and in compliance with the Conformance or Extended Transition Period authorities provided for under the proposed rule.[325]

Allowing banking entities to rely on these authorities for acquiring or retaining an ownership interest in or acting as sponsor to a covered fund will enable banking entities to manage their risks and structure their business in a manner consistent with their chosen corporate form and in a manner that otherwise complies with applicable laws. Thus, permitting such activities would promote and protect the safety and soundness of a banking entity, and would also promote and protect the financial stability of the United States.

d. Request for Comment

The Agencies request comment on the proposed rule's approach to implementing the exemption related to activities specifically determined to be permissible under section 13(d)(1)(J) of the BHC Act. In particular, the Agencies request comment on the following questions:

Question 302. Is the proposed rule's implementation of exemptions for covered fund activities and investments pursuant to section 13(d)(1)(J) of the BHC Act effective? If not, what alternative would be more effective and/or clearer?

Question 303. Is the proposed rule's approach to utilizing section 13(d)(1)(J) of the BHC Act to permit a banking entity to acquire or retain an ownership interest in, or act as sponsor to, certain entities that would fall into the definition of covered fund effective? Why or why not? If not, what alternative would be more effective and why? What legal authority under the statute would permit such an alternative?

Question 304. Are the proposed rule's provisions regarding when a covered fund activity will be deemed to be permitted under authority of section 13(d)(1)(J) of the BHC Act effective and sufficiently clear? If not, what alternative would be more effective and/or clearer?

Question 305. Do the exemptions provided for in § __.14 of the proposed rule effectively promote and protect the safety and soundness of banking entities and the financial stability of the United States? If not, why not?

Question 306. Are the proposed rule's provisions regarding what qualifications must be satisfied in order to qualify for an exemption under § __.14 of the proposed rule effective and sufficiently clear? If not, what alternative would be more effective and/or clearer? Should additional requirements be added? If so, what requirements and why? Should additional requirements be modified or removed? If so, what requirements and why or how?

Question 307. Does the proposed rule effectively cover the scope of covered funds activities which the Agencies should specifically determine to be permissible under section 13(d)(1)(J) of the BHC Act? If not, what activity or activities should be permitted? For additional activities that should be permitted, on what grounds would these activities promote and protect the safety and soundness of banking entities and the financial stability of the United States?

[321] The relevant agencies issued a proposed rule to implement the requirements of section 15G of the Exchange Act, as required under section 941 of the Dodd-Frank Act. *See* Credit Risk Retention, 76 FR 24090 (Apr. 29, 2011).

[322] *See* proposed rule § __.14(a)(2)(iii).

[323] *See id.* at § __.14(a)(2)(v).

[324] The Agencies note that proposed exemption applies only to the covered fund-related provisions of the proposed rule, and not to its prohibition on proprietary trading.

[325] *See* proposed rule § __.14(b). The Conformance or Extended Transition period authorities are substantially similar to those proposed by the Board in its February 2011 final rule governing such conformance periods under section 13 of the BHC Act.

Question 308. Does the proposed rule effectively address the interplay between the restrictions on covered fund activities and investments in section 13 of the BHC Act and the requirements imposed on certain banking entities under section 15G of the Exchange Act? Why or why not?

Question 309. Rather than permitting the acquisition or retentions of an ownership interest in, or acting as sponsor to, specific covered funds under section 13(d)(1)(J) of the BHC Act, should the Agencies use the authority provided under section 13(d)(1)(J) to permit investments in a covered fund that display certain characteristics? If so, what characteristics should the Agencies consider? How would investments with such characteristics promote and protect the safety and soundness of the banking entity and promote the financial stability of the United States?

Question 310. Should venture capital funds be excluded from the definition of ''covered fund''? Why or why not? If so, should the definition contained in rule 203(*l*)–1 under the Advisers Act be used? Should any modification to that definition of venture capital fund be made? How would permitting a banking entity to invest in such a fund meet the standards contained in section 13(d)(1)(J) of the BHC Act?

Question 311. Should non-U.S. funds or entities be included in the definition of ''covered fund''? Should any non-U.S. funds or entities be excluded from this definition? Why or why not? How would permitting a banking entity to invest in such a fund meet the standards contained in section 13(d)(1)(J) of the BHC Act?

Question 312. Should so-called ''loan funds'' that invest principally in loans and not equity be excluded from the definition of ''covered fund''? Why or why not? What characteristics would be most effective in determining whether a fund invests principally in loans and not equity? How would permitting a banking entity to invest in such a fund meet the standards contained in section 13(d)(1)(J) of the BHC Act?

Question 313. Are the proposed rule's proposed determinations that the specified covered funds activities or investments promote and protect the safety and soundness of banking entities and the financial stability of the United States appropriate? If not, how should the determinations be amended or altered?

6. Section __.15: Internal Controls, Reporting and Recordkeeping Requirements Applicable to Covered Fund Activities and Investments

Section __.15 of the proposed rule, which implements section 13(e)(1) of the BHC Act,[326] requires a banking entity engaged in covered fund activities and investments to comply with (i) the internal controls, reporting, and recordkeeping requirements required under § __.20 and Appendix C of the proposed rule, as applicable and (ii) such other reporting and recordkeeping requirements as the relevant supervisory Agency may deem necessary to appropriately evaluate the banking entity's compliance with this subpart C.[327] These requirements are discussed in detail in Part III.D of this Supplementary information.

7. Section __.16: Limitations on Relationships With a Covered Fund

Section 13(f) of the BHC Act generally prohibits a banking entity from entering into certain transactions with a covered fund that would be a covered transaction as defined in section 23A of the FR Act.[328] Section __.16 of the proposed rule implements this provision. Section __.16(a)(2) of the proposed rule clarifies that, for reasons explained in detail below, certain transactions between a banking entity and a covered fund remain permissible. Section __.16(b) of the proposed rule implements the statute's requirement that any transaction permitted under section 13(f) of the BHC Act (including a prime brokerage transaction) between the banking entity and covered fund is subject to section 23B of the FR Act,[329] which, in general, requires that the transaction be on market terms or on terms at least as favorable to the banking entity as a comparable transaction by the banking entity with an unaffiliated third party.

a. General Prohibition on Certain Transactions and Relationships

Section 13(f)(1) of the BHC Act generally prohibits a banking entity that, directly or indirectly, serves as investment manager, investment adviser, commodity trading adviser, or sponsor to a covered fund (or that organizes and offers a covered fund pursuant to section 13(d)(1)(G) of the BHC Act) from engaging in any transaction with the covered fund, or with any covered fund that is controlled by such fund, if the transaction would be a ''covered transaction'' as defined in section 23A of the FR Act, as if the banking entity and any affiliate thereof were a member bank and the covered fund were an affiliate thereof.[330] Section __.16(a)(1) of the proposed rule includes this prohibition.

Consistent with the requirements of section 13(f)(1) of the BHC Act, § __.16(a)(1) of the proposed rule is more restrictive than section 23A of the FR Act because § __.16(a)(1) generally prohibits a banking entity and any of its affiliates from entering into any such transaction, while section 23A permits covered transactions with affiliates so long as the transactions meet specified quantitative and qualitative requirements.[331]

b. Transactions That Would Be a ''Covered Transaction''

Section 13(f) of the BHC Act applies to covered transactions as defined in section 23A of the FR Act without incorporating any of the provisions in section 23A that provide exemptions from the prohibitions in that section for certain types of covered transactions.[332]

[326] Section 13(e)(1) of the BHC Act requires the Agencies to issue regulations regarding internal controls and recordkeeping to ensure compliance with section 13. *See* 12 U.S.C. 1851(e)(1).

[327] *See* proposed rule § __.15.

[328] 12 U.S.C. 371c.

[329] 12 U.S.C. 371c–1.

[330] As noted above, the proposed rule implements the definition of ''banking entity'' in a manner that does not include covered funds for which a banking entity acts as sponsor or organizes and offers pursuant to section 13(d)(1)(G) of the BHC Act, or any covered fund in which such related covered fund invests. Accordingly, these covered funds (and any covered fund in which such covered fund acquired or retains a controlling investment) are not generally subject to the prohibitions contained in § __.16 of the proposed rule.

[331] Section 23A of the FR Act limits the aggregate amount of covered transactions by a member bank to no more than (i) 10 per centum of the capital stock and surplus of the member bank in the case of any affiliate, and (ii) 20 per centum of the capital stock and surplus of the member bank in the case of all affiliates. *See* 12 U.S.C. 371c(a). Conversely, section 13(f) of the BHC Act operates as a general prohibition on such transactions without providing any similar amount of permitted transactions.

[332] The term ''covered transaction'' is defined in section 23A of the FR Act to mean, with respect to an affiliate of a member bank: (i) A loan or extension of credit to the affiliate, including a purchase of assets subject to an agreement to repurchase; (ii) a purchase of or an investment in securities issued by the affiliate; (iii) a purchase of assets from the affiliate, except such purchase of real and personal property as may be specifically exempted by the Board by order or regulation; (iv) the acceptance of securities or other debt obligations issued by the affiliate as collateral security for a loan or extension of credit to any person or company; (v) the issuance of a guarantee, acceptance, or letter of credit, including an endorsement or standby letter of credit, on behalf of an affiliate; (vi) a transaction with an affiliate that involves the borrowing or lending of securities, to the extent that the transaction causes a member bank or subsidiary to have credit exposure to the affiliate; or (vii) a derivative transaction, as defined in paragraph (3) of section 5200(b) of the Revised

Continued

Section __.16 of the proposed rule adopts the same language as the statute. The definition of ''covered transaction'' contained in section 23A of the FR Act itself includes an explicit exemption from the definition of ''covered transaction'' for ''such purchase of real and personal property as may be specifically exempted by the Board by order or regulation.'' [333] Since these transactions are, by definition, excluded from the definition of ''covered transaction,'' any transaction that is specifically exempted by the Board pursuant to this specific authority would not be deemed to be a covered transaction as defined in section 23A of the FR Act.

c. Certain Transactions and Relationships Permitted

While section 13(f)(1) of the BHC Act operates as a general prohibition on a banking entity's ability to enter into a transaction with a related covered fund that would be a covered transaction as defined under section 23A of the FR Act, other specific portions of the statute expressly provide for, or make reference to, a banking entity's ability to engage in certain transactions or relationships with such funds.[334] Section __.16(a)(2) of the proposed rule implements and clarifies these authorities.

i. Permitted Investments and Ownerships Interests

Section__.16(a)(2) of the proposed rule clarifies that a banking entity may acquire or retain an ownership interest in a covered fund in accordance with the requirements of subpart C of the proposed rule.[335] This clarification is proposed in order to remove any ambiguity regarding whether the section prohibits a banking entity from acquiring or retaining an interest in securities issued by a related covered fund in accordance with the other provisions of the rule, since the purchase of securities of a related covered fund would be a covered transaction as defined by section 23A of the FR Act. There is no evidence that Congress intended section 13(f)(1) of the BHC Act to override the other provisions of section 13 with regard to the acquisition or retention of ownership interests specifically permitted by the section. Moreover, a contrary reading would make these more specific sections that permit covered transactions between a banking entity and a covered fund mere surplusage.

ii. Prime Brokerage Transactions Also Permitted

Section __.16(a)(2)(ii) of the proposed rule implements section 13(f)(3)(A) of the BHC Act, which provides that a banking entity may enter into any prime brokerage transaction with a covered fund in which a covered fund managed, sponsored, or advised by such banking entity has taken an ownership interest, so long as certain enumerated conditions are satisfied.[336] The proposed rule defines ''prime brokerage transaction'' to mean one or more products or services provided by the banking entity to a covered fund, such as custody, clearance, securities borrowing or lending services, trade execution, or financing, and data, operational, and portfolio management support.[337] To engage in a prime brokerage transaction with a covered fund pursuant to § __.16(a)(2)(ii) of the proposed rule, a banking entity must be in compliance with the limitations set forth in § __.11 of the proposed rule with respect to a covered fund organized and offered by such banking entity. In addition, as required by statute, the chief executive officer (or equivalent officer) of the banking entity must certify in writing annually that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests. Finally, the Board must not have determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity.

d. Restrictions on Transactions With Any Permitted Covered Fund

Section __.16(b) of the proposed rule implements sections 13(f)(2) and 13(f)(3)(B) of the BHC Act and applies section 23B of the FR Act [338] to certain transactions and investments between a banking entity and a covered fund as if such banking entity were a member bank and such covered fund were an affiliate thereof.[339] Section 23B provides that transactions between a member bank and an affiliate must be on terms and under circumstances, including credit standards, that are substantially the same or at least as favorable to such banking entity as those prevailing at the time for comparable transactions with or involving other unaffiliated companies or, in the absence of comparable transactions, on terms and under circumstances, including credit standards, that in good faith would be offered to, or would apply to, nonaffiliated companies.[340]

Section __.16(b) applies this requirement to transactions between a banking entity that serves as investment manager, investment adviser, commodity trading adviser, or sponsor to a covered fund and that fund and any other fund controlled by that fund. It also applies this condition to a permissible prime brokerage transaction in which a banking entity may engage pursuant to § __.16(a)(2)(ii) of the proposed rule.[341]

e. Request for Comment

The Agencies request comment on the proposed rule's approach to implementing the limitations on certain relationships with covered funds and, in particular, the manner in which the Agencies have proposed to apply a banking entity's ability to make explicitly permitted investments for these purposes, as described above. In particular, the Agencies request comment on the following questions:

Question 314. Is the proposed rule's approach to implementing the limitations on certain transactions with a covered fund effective? If not, what alternative approach would be more effective and why?

Question 315. Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?

Question 316. What types of transactions or relationships that currently exist between banking entities and a covered fund (or another covered fund in which such covered fund makes a controlling investment) would be prohibited under the proposed rule? What would be the effect of the proposed rule on banking entities' ability to continue to meet the needs and demands of their clients? Are there other transactions between a banking entity and such covered funds that are not already covered but that should be prohibited or limited under the proposed rule?

Question 317. Should the Agencies provide a different definition of ''prime

Statutes of the United States (12 U.S.C. 84(b)), with an affiliate, to the extent that the transaction causes a member bank or a subsidiary to have credit exposure to the affiliate. *See* 12 U.S.C. 371c(b)(7), *as amended* by section 608 of the Dodd-Frank Act.

[333] *Id.* at 371c(b)(7)(C).

[334] *See, e.g.,* 12 U.S.C. 1851(d)(1)(G), (d)(4), and (f)(3).

[335] *See* proposed rule § __.16(a)(2)(i).

[336] *See* proposed rule § __.16(a)(2)(ii).

[337] *See* proposed rule § __.10(b)(4).

[338] 12 U.S.C. 371c–1.

[339] *See* proposed rule § __.16(b).

[340] 12 U.S.C. 371c–1(a); 12 CFR 223.51.

[341] *See* 12 U.S.C. 1851(f)(2), (f)(3)(B); proposed rule § __.16(b).

brokerage transaction'' under the proposed rule? If so, what definition would be appropriate? Are there any transactions that should be included in the definition of ''prime brokerage transaction''? Are there transactions or practices provided by banking entities that should be excluded in order to mitigate the burdens of complying with section 13 of the BHC Act?

Question 318. With respect to the CEO (or equivalent officer) certification required under section 13(f)(3)(A)(ii) of the BHC Act and § __.16(a)(2)(ii)(B) of the proposed rule, what would be the most useful, efficient method of certification (e.g., a new stand-alone certification, a certification incorporated into an existing form or filing, Web site certification, or certification filed directly with the relevant Agency)?

8. Section __.17: Other Limitations on Permitted Covered Funds Activities

Section __.17 of the proposed rule implements section 13(d)(2) of the BHC Act, which places certain limitations on the permitted covered fund activities and investments in which a banking entity may engage. Consistent with the statute and § __.8 of the proposed rule, § __.17 provides that no transaction, class of transactions, or activity is permissible under §§ __.11 through __.16 of the proposed rule if the transaction, class of transactions, or activity would:

- Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;
- Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or
- Pose a threat to the safety and soundness of the banking entity or the financial stability of the United States.

Section __.17 of the proposed rule further defines ''material conflict of interest,'' ''high-risk assets,'' and ''high-risk trading strategies'' for these purposes, which are identical to the definitions of the same terms for purposes of § __.8 of the proposed rule related to proprietary trading, and are described in detail in Part III.B.6 of this Supplementary Information.[342]

The Agencies request comment on the proposed limitations on permitted covered fund activities and investments, including with respect to the questions in Part III.B.6 of the Supplemental Information as they pertain to covered fund activities and investments in particular.

D. Subpart D (Compliance Program Requirement) and Appendix C (Minimum Standards for Programmatic Compliance)

Subpart D of the proposed rule, which implements section 13(e)(1) of the BHC Act,[343] requires certain banking entities to develop and provide for the continued administration of a program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on covered trading activities and covered fund activities and investments set forth in section 13 of the BHC Act and the proposed rule.[344] This compliance program requirement forms a key part of the proposal's multi-faceted approach to implementing section 13 of the BHC Act, and is intended to ensure that banking entities establish, maintain and enforce compliance procedures and controls to prevent violation or evasion of the prohibitions and restrictions on covered trading activities and covered fund activities and investments.

1. Section __.20: Compliance Program Mandate

The proposed rule adopts a tiered approach to implementing the compliance program mandate, requiring a banking entity engaged in covered trading activities or covered fund activities and investments to establish a compliance program that contains specific elements and, if the banking entity's activities are significant, meet a number of minimum standards. If a banking entity does not engage in covered trading activities and covered fund activities and investments, it must ensure that its existing compliance policies and procedures include measures that are designed to prevent the banking entity from becoming engaged in such activities and making such investments and must develop and provide for the required compliance program under proposed § __.20(a) of the proposed rule prior to engaging in such activities or making such investments, but is not otherwise required to meet the requirements of subpart D of the proposed rule.[345]

Section __.20(a) of the proposed rule contains the core requirement that each banking entity engaged in covered trading activities or covered fund activities and investments must establish, maintain and enforce a program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading activities and covered fund activities and investments set forth in section 13 of the BHC Act and the proposed rule and that such program must be suitable for the size, scope, and complexity of activities and business structure of the banking entity. Section __.20(b) of the proposed rule specifies the following six elements that each compliance program established under subpart D must provide for, at a minimum:

- Internal written policies and procedures reasonably designed to document, describe, and monitor the covered trading activities and covered fund activities and investments of the banking entity to ensure that such activities and investments comply with section 13 of the BHC Act and the proposed rule;
- A system of internal controls reasonably designed to monitor and identify potential areas of noncompliance with section 13 of the BHC Act and the proposed rule in the banking entity's covered trading activities and covered fund activities and investments and to prevent the occurrence of activities that are prohibited by section 13 of the BHC Act and the proposed rule;
- A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and the proposed rule;
- Independent testing for the effectiveness of the compliance program, conducted by qualified banking entity personnel or a qualified outside party;
- Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and
- Making and keeping records sufficient to demonstrate compliance with section 13 of the BHC Act and the proposed rule, which a banking entity must promptly provide to the relevant supervisory Agency upon request and retain for a period of no less than 5 years.

[342] As noted in the discussion of the definition of ''material conflict of interest in Part III.B.6 of this Supplementary Information, the proposed disclosure provisions of that definition are provided solely for purposes of the proposed rule's definition of material conflict of interest, and do not affect a banking entity's obligation to comply with additional or different disclosure or other requirements with respect to a conflict under applicable securities, banking, or other laws (e.g., section 27B of the Securities Act, which governs conflicts of interest relating to certain securitizations; section 206 of the Investment Advisers Act of 1940, which applies to conflicts of interest between investment advisers and their clients; or 12 CFR 9.12, which applies to conflicts of interest in the context of a national bank's fiduciary activities).

[343] *See* 12 U.S.C. 1851(e)(1).

[344] *See* proposed rule § __.20.

[345] *See* proposed rule § __.20(d).

In addition, for a banking entity with significant covered trading activities or covered fund activities and investments, § __.20(c) requires the compliance program established under subpart D to meet a number of minimum standards, which are specified in Appendix C of the proposed rule. In particular, a banking entity must comply with the minimum standards specified in Appendix C of the proposed rule if:

- With respect to its covered trading activities, it engages in any covered trading activities and has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters, (i) is equal to or greater than
$1 billion or (ii) equals 10 percent or more of its total assets; and
- With respect to its covered fund activities and investments, it engages in any covered fund activities and investments and either (i) has, together with its affiliates and subsidiaries, aggregate investments in one or more covered funds the average value of which is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion or (ii) sponsors or advises, together with its affiliates and subsidiaries, one or more covered funds the average total assets of which are, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion.

The application of detailed minimum standards to these types of banking entities is intended to reflect the heightened compliance risks of large covered trading and large covered fund activities and investments and provide guidance to such banking entities regarding the minimum compliance measures that would be required under the proposed rule.

If a banking entity does not meet the thresholds specified in § __.20(c)(2), it need not comply with each of the minimum standards specified in Appendix C. However, the proposed rule would require such a banking entity to establish a compliance program that effectively implements the six elements specified in § __.20(b). Banking entities engaged in a relatively small amount of covered fund activities are encouraged to look to the minimum standards of Appendix C for guidance. Generally, the Agencies would expect that the closer a banking entity is to the thresholds specified in § __.20(c)(2), the more its compliance program should generally include the specific requirements described in Appendix C. Within the bounds of subpart D and Appendix C, a banking entity has discretion to structure and manage its program for compliance with section 13 of the BHC Act and the proposed rule in a manner that best reflects the unique organization and operation of the banking entity and its affiliates and subsidiaries, and is suitable taking account of the size, scope, and complexity of activities in which the banking entity and its affiliates and subsidiaries engage.

As described above, § __.20(d) of the proposed rule clarifies that, if a banking entity does not engage in covered trading activities and/or covered fund activities or investments, it will have satisfied the requirements of this section if its existing compliance policies and procedures include measures that are designed to prevent the banking entity from becoming engaged in such activities or making such investments and which require the banking entity to develop and provide for the compliance program required under paragraph (a) of this section prior to engaging in such activities or making such investments.

2. Appendix C—Minimum Standards for Programmatic Compliance

Appendix C of the proposed rule specifies a variety of minimum standards applicable to the compliance program of a banking entity with significant covered trading activities or covered fund activities and investments.[346] Section I.A of proposed Appendix C sets forth the purpose of the required compliance program, which is to ensure that each banking entity establishes, maintains, and enforces an effective compliance program, consisting of written policies and procedures, internal controls, a management framework, independent testing, training, and recordkeeping, that:

- Is designed to clearly document, describe, and monitor the covered trading activities and covered fund activities or investments and the risks of the banking entity related to such activities or investments, identify potential areas of noncompliance, and prevent activities or investments prohibited by, or that do not comply with, section 13 of the BHC Act and the proposed rule;
- Specifically addresses the varying nature of activities or investments conducted by different units of the banking entity's organization, including the size, scope, complexity, and risks of the individual activity or investment;
- Subjects the effectiveness of the compliance program to independent review and testing;
- Makes senior management and intermediate managers accountable for the effective implementation of the compliance program, and ensures that the board of directors or chief executive officer (''CEO'') review the effectiveness of the compliance program; and
- Facilitate supervision of the banking entity's covered trading activities and covered fund activities or investments by the Agencies.

A banking entity's compliance program should not be developed through a generic, one-size-fits-all approach, but rather should carefully take into account and reflect the unique manner in which a banking entity operates, as well as the particular compliance risks and challenges that its businesses present. In light of the complexities presented in differentiating prohibited proprietary trading from permitted market making-related activities in particular, the Agencies expect that such a dynamic, carefully-tailored approach to internal compliance will play an important role in ensuring that banking entities comply with section 13's prohibitions and restrictions. In addition, although this statement of purpose appears within the text of proposed Appendix C, the Agencies note the statement equally describes the general purpose of any compliance program required under subpart D of the proposed rule, regardless of whether proposed Appendix C specifically applies.

Section I.B of proposed Appendix C provides for several definitions used throughout the appendix, including the definition of ''trading unit'' and ''asset management unit'' to which the minimum standards apply. The term ''trading unit'' is defined in the same way as in Appendix A, as described in Part II.B.5 of the Supplementary Information, and is intended to identify multiple layers of a banking entity's organizational structure because any effective compliance program will need to manage, limit and monitor covered trading activity at each such level of organization in order to effectively support compliance with the prohibition on proprietary trading. The term ''asset management unit'' is defined as any unit of organization of a banking entity that makes an investment in, acts as sponsor to, or has relationships with, a covered fund that the banking entity sponsors, organizes and offers, or in which a covered fund

[346] The Agencies have proposed to include these minimum standards as part of the regulation itself, rather than as accompanying guidance, reflecting the compliance program's importance within the general implementation framework.

sponsored or advised by a banking entity invests.

Section I.C of proposed Appendix C incorporates by reference the six elements that must be included in the compliance program under § __.20 of the proposed rule, and section I.D describes the structure of a compliance program meeting the minimum standards. In particular, section I.D permits a banking entity to establish a compliance program on an enterprise-wide basis to satisfy the requirements of § __.20 of the proposed rule and the appendix, which program could cover the banking entity and all of its affiliates and subsidiaries collectively. In order to do so, the program must (i) be clearly applicable, both by its terms and in operation, to all such affiliates and subsidiaries, (ii) specifically address the requirements set forth in proposed Appendix C, (iii) take into account and address the consolidated organization's business structure, size, and complexity, as well as the particular activities, risks, and applicable legal requirements of each subsidiary and affiliate, and (iv) be determined through periodic independent testing to be effective for the banking entity and its affiliates and subsidiaries. In addition, the enterprise-wide program would be subject to supervisory review and examination by any Agency vested with rulewriting authority under section 13 of the BHC Act with respect to the compliance program and the activities of any banking entity for which the Agency has such authority. Further, such Agency would have access to all records related to the enterprise-wide compliance program pertaining to any banking entity that is supervised by the Agency vested with such rulewriting authority.

a. Internal Policies and Procedures

Section II of proposed Appendix C articulates minimum standards for the first element of the compliance program, internal policies and procedures, for both covered trading activities and covered fund activities and investments. With respect to covered trading activities, the proposal would require that internal policies and procedures: (i) Specify how the banking entity identifies its trading accounts; (ii) identify the trading activity in which the banking entity is engaged and how that activity is organized; (iii) thoroughly articulate the mission, strategy, risks, and compliance controls for each trading unit; (iv) include for each trader a mandate that describes the scope of his or her trading activity; (v) clearly articulate and document a comprehensive description of the risks associated with the trading unit's activities; (vi) document a comprehensive explanation of how the mission and strategy of the trading unit, and its related risk levels, comply with the proposed rule; and (vii) require the banking entity to promptly address and remedy any violation of section 13 of the BHC Act and the proposed rule. These internal policies and procedures would require banking entities to have the data and standards to prevent prohibited proprietary trading and to identify abnormalities and discrepancies that may be indicative of prohibited proprietary trading. The internal policies and procedures should also provide the Agencies with a clear, comprehensive picture of a banking entity's covered trading activities that can be effectively reviewed. With respect to covered fund activities and investments, the proposal would require that internal policies and procedures describe all covered fund activities in which the banking entity engages and the procedures used by the banking entity to ensure that it complies with the restrictions of section 13 of the BHC Act and the proposed rule.

The Agencies expect that these internal policies and procedures will be regularly reviewed and updated to reflect changes in business practices, strategies, or laws and regulations, though frequent, unexplained changes to policies and procedures or other aspects of the compliance program—particularly changes to reduce their stringency—would warrant additional scrutiny from banking entity management, independent testing personnel, and Agency supervisors or examiners.

b. Internal Controls

Section III of proposed Appendix C articulates minimum standards for the second element of the compliance program, internal controls. With respect to covered trading activities, the proposal would require internal controls that: (i) Are reasonably designed to ensure that the covered trading activity is conducted in conformance with a trading unit's authorized risks, instruments and products, as documented in the banking entity's written policies and procedures; (ii) establish and enforce risk limits for each trading unit; and (iii) perform robust analysis and quantitative measurement of covered trading activity for conformance with section 13 of the BHC Act and the proposed rule. In particular, the banking entity must perform analysis and quantitative measurement that is reasonably designed to: (i) Ensure that the activity of each trading unit is appropriate to the mission, strategy, and risk of each trading unit, as documented in the banking entity's internal written policies and procedures; (ii) monitor and assist in the identification of potential and actual prohibited trading activity; and (iii) prevent the occurrence of prohibited proprietary trading. This analysis and measurement should incorporate the quantitative measurements calculated and reported under Appendix A of the proposed rule, but should also include other analysis and measurements developed by the banking entity that are specifically tailored to the business, risks, practices, and strategies of its trading units. The Agencies expect that the thoughtful use of these types of quantitative tools to monitor the extent to which the activities of a trading unit are consistent with its stated mission, strategy, and risk profile may help identify, for both banking entities and Agencies, abnormalities or discrepancies in permitted trading activity that may be indicative of prohibited proprietary trading. In addition, these internal controls must provide for regular monitoring of the effectiveness of the banking entity's compliance program and require the banking entity to take prompt action to address and remedy any deficiencies identified and to provide timely notification to the relevant Agency of any investigation and remedial action taken.

With respect to covered fund activities and investments, the internal controls required under section III of proposed Appendix C generally focus on ensuring that a banking entity has effective controls in place to monitor its investments in, and relationships with, covered funds to ensure its compliance with the covered fund activity and investments restrictions, including controls that relate to implementing remedies in the event of a violation of the requirements of section 13 of the BHC Act and the proposed rule.

c. Responsibility and Accountability

Section IV of proposed Appendix C articulates minimum standards for the third element of the compliance program, responsibility and accountability. These standards focus on four key constituencies—the board of directors, the CEO, senior management, and managers at each trading unit and asset management unit level. Section IV makes clear that the board of directors, or similar corporate body, and the CEO are responsible for creating an appropriate ''tone at the top'' by setting an appropriate culture of compliance and establishing clear policies regarding the management of covered trading activities and covered fund activities

and investments. Senior management must be made responsible for communicating and reinforcing the culture of compliance established by the board of directors and the CEO, for the actual implementation and enforcement of the approved compliance program, and for taking effective corrective action, where appropriate. Managers with responsibility for one or more trading units or asset management units of the banking entity that are engaged in covered trading activity or covered fund activity and investments are accountable for effective implementation and enforcement of the compliance program for the applicable trading unit or asset management unit.

d. Independent Testing

Section V of proposed Appendix C articulates minimum standards for the fourth element of the compliance program, independent testing. A banking entity subject to the appendix must ensure that its independent testing is conducted by a qualified independent party, such as the banking entity's internal audit department, outside auditors, consultants or other qualified independent parties. The independent testing must examine both the banking entity's compliance program and its actual compliance with the proposed rule. Such testing must include not only the general adequacy and effectiveness of the compliance program and compliance efforts, but also the effectiveness of each element of the compliance program and the banking entity's compliance with each provision of the proposed rule. This requirement is intended to ensure that a banking entity continually reviews and assesses, in an objective manner, the strength of its compliance efforts and promptly identifies and remedies any weaknesses or matters requiring attention within the compliance framework.

e. Training

Section VI of proposed Appendix C articulates minimum standards for the fifth element of the compliance program, training. It proposes to require that a banking entity provide adequate training to its trading personnel and managers, as well as other appropriate personnel, in order to effectively implement and enforce the compliance program. In particular, personnel engaged in covered trading activities or covered fund activities and investments should be educated with respect to applicable prohibitions and restrictions, exemptions, and compliance program elements to an extent sufficient to permit them to make informed, day-to-day decisions that support the banking entity's compliance with the proposed rule and section 13 of the BHC Act. In particular, any personnel with discretionary authority to trade, in any amount, should be appropriately trained regarding the differentiation of prohibited proprietary trading and permitted trading activities and given detailed guidance regarding what types of trading activities are prohibited. Similarly, personnel providing investment management or advisory services, or acting as general partner, managing member, or trustee of a covered fund, should be appropriately trained regarding what covered fund activities and investments are permitted and prohibited.

f. Recordkeeping

Section VII of proposed Appendix C articulates minimum standards for the sixth element of the compliance program, recordkeeping. Generally, a banking entity must create records sufficient to demonstrate compliance and support the operation and effectiveness of its compliance program (i.e., records demonstrating the banking entity's compliance with the requirements of section 13 of the BHC Act and the proposed rule, any scrutiny or investigation by compliance personnel or risk managers, and any remedies taken in the event of a violation or non-compliance), and retain these records for no less than five years in a form that allows the banking entity to promptly produce these records to any relevant Agency upon request. Records created and retained under the compliance program shall include trading records of the trading units, including trades and positions of each such unit.

g. Request for Comment

The Agencies request comment on the compliance program requirement contained in § __.20 of the proposed rule and the minimum standards specified in proposed Appendix C. In particular, the Agencies request comment on the following questions:

Question 319. Is the proposed rule's inclusion of a compliance program requirement effective in light of the purpose and language of the statute? If not, what alternative would be more effective?

Question 320. Is the proposed application of § __.20's compliance program requirement to all banking entities engaged in covered trading activity or covered trading investments and activities and the minimum standards of proposed Appendix C to only banking entities with significant covered trading or covered fund activities, effective? If not, what alternative would be more effective? Should proposed Appendix C apply to all banking entities? If so, why? Are the thresholds proposed for determining whether a banking entity must comply with proposed Appendix C appropriate? If not, what alternative would be more effective?

Question 321. What implementation, operational, or other burdens or expenses might be associated with the compliance program requirement? How could those burdens or expenses be reduced or eliminated in a manner consistent with the purpose and language of the statute?

Question 322. Do the proposed compliance program requirement and minimum standards provide sufficient guidance and clarity regarding how compliance programs should be structured? If not, what additional guidance or clarity is needed? Do the proposed compliance program requirement and minimum standards provide sufficient discretion to banking entities to structure a compliance program that appropriately reflects the unique nature of their businesses? If not, how could additional discretion be provided in a manner consistent with the purpose and language of the statute?

Question 323. Are the six proposed elements of a required compliance program effective? If not, what alternative would be more effective? Should elements be added or removed? If so, which ones and why?

Question 324. For each of the six proposed elements of a required compliance program for which minimum standards are provided in proposed Appendix C, are the proposed minimum standards effective? If not, what alternative would be more effective? Should minimum standards be added or removed? If so, which ones and why?

Question 325. Does the requirement that a banking entity provide timely notification to the relevant Agency provide sufficient guidance as to what activities must be reported and how and when such reporting should be made? Should more specific standards be provided (e.g., regarding the timing of reporting and the types of activities that must be reported)? If so, what additional criteria should be implemented? Should the notification requirement be applied explicitly to banking entities that are not required to comply with the minimum standards specified in Appendix C because they are below the thresholds specified in § __.20(c)(2)? Why or why not?

Question 326. Are there specific records that banking entities should be

required to make and keep to document compliance with section 13 of the BHC Act and the proposed rule? Please explain.

Question 327. What process should the Agencies use in determining whether to require a banking entity that, based on its size, would not be subject to Appendix C to comply with all or portions of the appendix under section I.E of the proposed appendix? What considerations should the Agencies take into account in making such a determination? Should this requirement be implemented by an Agency order, by authority delegated to Agency staff, or a different method? Please explain.

Question 328. Should the proposed rule permit banking entities to comply with Appendix C of the proposed rule on an enterprise-wide basis? If so, why? What are the advantages and disadvantages of an enterprise-wide compliance program? Should the proposed appendix provide additional clarity or discretion regarding how such an enterprise-wide program should be structured? If so, how? Please include a discussion relating to the infrastructure of an enterprise-wide compliance program and its management. If enterprise-wide compliance or similar programs are used in other contexts, please describe your experience with such programs and how those experiences influence your judgment concerning whether or not you would choose an enterprise-wide compliance program in this context.

Question 329. Should the proposed rule permit banking entities to comply with § __.20(b) of the proposed rule on an enterprise-wide basis? If so, why? What are the advantages and disadvantages of an enterprise-wide compliance program for smaller banking entities that are not subject to Appendix C? Please include a discussion relating to the infrastructure of an enterprise-wide compliance program and its management in the context of smaller banking entities. If enterprise-wide compliance or similar programs are used in other contexts, please describe your experience with such programs and how those experiences influence your judgment concerning whether or not you would choose an enterprise-wide compliance program in this context. Are there particular reasons why a enterprise-wide compliance program should be permitted for larger banking entities subject to the requirements of Appendix C, but not those that are subject to § __.20(b) of the proposed rule?

Question 330. What are the particular challenges that should be considered in connection with establishing a compliance program on an enterprise-wide basis? How will such challenges be addressed? Can an enterprise-wide compliance program be appropriately tailored to each of the subsidiaries and affiliates of a banking entity?

Question 331. Are there efficiencies that can be gained through an enterprise-wide compliance program? If so, how and what efficiencies?

Question 332. Would the complexities of various types of covered trading activity be adequately reflected in an enterprise-wide compliance program?

Question 333. Should only outside parties be permitted to conduct independent testing for the effectiveness of the proposed compliance program to satisfy certain minimum standards? If so, why? Under the proposal, the independent testing requirement may be satisfied by testing conducted by an internal audit department or a third party. Should the rule specify the minimum standards for ''independence'' as applied to internal and/or external parties testing the effectiveness of the compliance program? For example, would an internal audit be deemed to be independent if none of the persons involved in the testing are involved with, or report to persons that are involved with, activities implicated by section 13 of the BHC Act? Why or why not?

Question 334. Do you anticipate that banking entities that do not meet the thresholds specified in § __.20(c) would voluntarily comply with the proposed minimum standards in Appendix C in order to effectively implement the six elements specified in § __.20(b)? Are there specific minimum standards that would not be practical or would be unattainable for a banking entity that does not meet the § __.20(c) thresholds? Please identify the minimum standard(s) and explain.

Question 335. In light of the size, scope, complexity, and risk of covered trading activities, do commenters anticipate the need to hire new staff with particular expertise in order to establish, maintain, and enforce the proposed compliance program requirement concerning covered trading activities or any subset of covered trading activities?

Question 336. With respect to the proposed requirement that training should occur with a frequency appropriate to the size and risk profile of the banking entity's covered trading activities and covered fund activities, should there be a minimum requirement that such training shall be conducted no less than once every twelve (12) months? If so, why?

Question 337. Should proposed rule's Appendix C be revised to require a banking entity's CEO to annually certify that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program established pursuant to Appendix C in a manner that is reasonably designed to achieve compliance with section 13 of the BHC Act and this proposal? If so, why? If so, what would be the most useful, efficient method of certification (e.g., a new stand-alone certification, a certification incorporated into an existing form or filing, Web site certification, or certification filed directly with the relevant Agency)? Would a central data repository with a CEO attestation to the Agencies be a preferable approach?

Question 338. Do the proposed rule requirements relating to establishment and implementation of a compliance program pose unique concerns or challenges to issuers of asset-backed securities that are banking entities, and if so, why? Are certain asset classes particularly impacted by the proposed rule requirements, and if so, how?

Question 339. How would existing issuers of asset-backed securities that are banking entities pay for establishing and implementing a compliance program? Should existing issuers of asset-backed securities that cannot comply with the compliance program requirements be excluded from the proposed definition of ''banking entity''? Should such exclusion be limited, and if so, based on what factors? Are the proposed thresholds specified in § ____.20(c) of the proposed rule and/or the allowance of an enterprise-wide compliance program as set forth in Appendix C of the proposed rule sufficient to minimize these concerns for issuers of asset-backed securities?

Question 340. With respect to future securitizations, what would be the impact of the establishment and implementation of the compliance program related to the provisions of the proposed rule as required by § __.20 of the proposed rule (including Appendix C, where applicable)? Are the proposed thresholds specified in § __.20(c) of the proposed rule and/or the allowance of an enterprise-wide compliance program as set forth in Appendix C of the proposed rule sufficient to minimize these concerns for issuers of asset-backed securities?

Question 341. Would existing issuers of asset-backed securities that are banking entities be able to establish and implement a compliance program related to the provisions of the proposed rule as required by § __.20 of the

proposed rule (including Appendix C, where applicable)? If amendments to transactional documents are necessary, are there any obstacles that would make such amendments difficult to execute? If existing issuers of asset-backed securities cannot establish and implement a compliance program, what would be the impact on such existing issuers of asset-backed securities and the holders of securities issued by a non-compliant issuer of asset-backed securities? Is the allowance of an enterprise-wide compliance program as set forth in Appendix C of the proposed rule sufficient to minimize these concerns for issuers of asset-backed securities?

Question 342. To rely on the exemptions for permitted underwriting, market making-related, and risk-mitigating hedging activities, the proposed rule requires banking entities to establish the internal compliance program under § __.20 and, where applicable, Appendix C, designed to ensure compliance with the requirements of the applicable exemption (e.g., policies and procedures, internal controls and monitoring procedures, etc.). Do these requirements in the proposed rule impose undue cumulative burdens, such that the marginal benefit of a given requirement is not justified by the cost that the requirement imposes? If so, why does the proposed rule impose cumulative burdens and what are the costs of those burdens? Please explain the circumstances under which these burdens may arise. Is there a way to reduce or eliminate such burdens or requirements in a manner consistent with the language and purpose of the statute? For any requirements that impose undue burdens, are there other requirements that could be substituted that would more efficiently ensure compliance with the statute? Are there any requirements that the proposed rule imposes that are particularly effective, and if so, how can the Agencies make better use of these requirements?

Question 343. Are the six elements of the proposed compliance program requirement mutually reinforcing and cost effective, or are there redundancies in the six elements? Please explain any redundant requirements in the policies and procedures, internal controls, management framework, independent testing, training, and recordkeeping requirements in § __.20(b) of the proposed rule or proposed Appendix C. Why are such requirements redundant, and how should the redundancy be addressed and remedied in the rule?

Question 344. A banking entity that meets the $1 billion or greater trading assets and liabilities threshold would be required under the proposed rule to comply with both the reporting and recordkeeping requirements in Appendix A with respect to quantitative measurements and the compliance program requirement in Appendix C. Are the requirements in these appendices mutually reinforcing and cost effective, or do the appendices impose redundant requirements on banking entities that meet the $1 billion threshold? Please explain any redundant requirements in the appendices and how such redundancy should be addressed and remedied in the rule.

Question 345. Proposed Appendix C incorporates the quantitative measurements provided in proposed Appendix A in the internal controls requirement for banking entities that are engaged in covered trading activity and meet the $1 billion or greater trading assets and liabilities threshold. Do the requirements in proposed Appendix A and Appendix C impose undue cumulative burdens with respect to any elements (e.g., quantitative measurements), such that the marginal benefit of a given requirement is not justified by the cost that the requirement imposes? Please explain why the proposed appendices impose cumulative burdens, the costs of those burdens, and the circumstances under which these burdens may arise. Is there a way to reduce or eliminate such burdens or requirements in a manner consistent with the language and purpose of the statute? For any requirements in the appendices that impose undue burdens, are there other requirements that could be substituted that would more efficiently ensure compliance with the statute? Are there any requirements that the proposed appendices impose that are particularly effective, and if so, how can the Agencies make better use of these requirements?

Question 346. Should the relevant Agency prescribe any specific method by which the board of directors or similar corporate body reviews and approves the compliance program? For example, should the relevant Agency require that: (i) A chief compliance officer or similar officer present an annual compliance report including, as appropriate, recommended actions to be taken by the banking entity to improve compliance or correct any compliance deficiencies; (ii) the board review any such recommendations and determine whether to approve them; and (iii) the banking entity notify the relevant Agency if the board declines to approve such recommendations, or approves different actions than those recommended in the compliance report? What are the advantages and disadvantages of such an approach?

3. *Section __.21: Termination of Activities or Investments; Penalties for Violations*

Section __.21 of the proposed rule implements section 13(e)(2) of the BHC Act, which requires the termination of activities or investments that violate or function as an evasion of section 13 of the Act.[347] In particular, § __.21(a) of the proposed rule requires any banking entity that engages in an activity or makes an investment in violation of section 13 of the BHC Act or the proposed rule or in a manner that functions as an evasion of the requirements of section 13 of the BHC Act or the proposed rule, including through an abuse of any activity or investment permitted under subparts B or C, or otherwise violates the restrictions and requirements of section 13 of the BHC Act or the proposed rule, to terminate the activity and, as relevant, dispose of the investment.[348] Section __.21(b) of the proposed rule provides that if a relevant Agency finds reasonable cause to believe any banking entity has engaged in an activity or made an investment described in paragraph (a), the relevant Agency may, after due notice and an opportunity for hearing, by order, direct the banking entity to restrict, limit, or terminate the activity and, as relevant, dispose of the investment.[349]

E. Subpart E—Conformance Provisions

Section 13(c)(6) of the BHC Act required the Board, acting alone, to adopt rules implementing those provisions of section 13 of the BHC Act that provide a banking entity or a nonbank financial company supervised by the Board a period of time *after* the effective date of section 13 of the BHC Act to bring the activities, investments, and relationships of the banking entity or company that were commenced, acquired, or entered into before the effective date of section 13 of the BHC Act into compliance with that section and the agencies' implementing regulations.[350] The Board's Conformance Rule, which was required

[347] *See* 12 U.S.C. 1851(e)(2).

[348] *See* proposed rule § __.21(a). The Agencies have proposed to include § __.21(a), in addition to the provisions of § __.21(b) of the proposed rule, to make clear that the requirement to terminate an activity or, as relevant, dispose of an investment would be triggered where a banking entity discovers a violation or evasion, regardless of whether an Agency order has been issued.

[349] *See* proposed rule § __.21(b).

[350] *See* 12 U.S.C. 1851(c)(6).

under section 13(c)(6) of the BHC Act, was issued on February 8, 2011.[351] As noted in its issuing release, this period is intended to give markets and firms an opportunity to adjust to section 13 of the BHC Act.[352]

As part of the current proposal, the Board is proposing to relocate the Board's Conformance Rule, which was added as §§ 225.180–182 of the Board's Regulation Y, to subpart E of the Board's proposed rule.[353] The Board is also proposing to make certain conforming and technical changes to the language and defined terms of the Board's Conformance Rule in connection with its proposed relocation to subpart E of the Board's current proposal. The Board is not, however, proposing any substantive changes to the Board's Conformance Rule as part of this proposed rule. In particular, the Board's Conformance Rule defined certain terms related to section 13 of the BHC Act, including ''banking entity,'' ''hedge fund and private equity fund,'' ''insured depository institution,'' and ''Board.'' [354] For the sake of consistency, the Board is proposing to eliminate these definitions as they are now defined elsewhere, and in more comprehensive a manner, in the proposed rule.[355] These alternative or replacement definitions are substantially similar to those contained in the Board's Conformance Rule and are discussed in further detail in Part III.A.2 of this Supplementary Information.

In connection with incorporating provisions of the existing Board's Conformance Rule into the current proposal, the Board notes that the conformance period and extended transition period provided by section 13(c) of the BHC Act and the Board's Conformance Rule do *not* permit a banking entity to engage in any new activity or make any new investment in a covered fund without complying with the restrictions and prohibitions of section 13 of the BHC Act and implementing rules thereunder. The conformance period and extended transition period provided by the Board's Conformance Rule permit a banking entity to bring those of its *existing* activities and investments that do not conform to the requirements of section 13 of the BHC Act and the proposed rule into conformance. The Board's Conformance Rule does *not* authorize a banking entity to engage in *new* or *additional* prohibited activities or investments, and this restriction would continue to apply under the current proposed rule.

With respect to proprietary trading, the Board expects that each banking entity will identify those trading units of the banking entity that are engaged in prohibited proprietary trading as of or after the effective date of section 13 of the BHC Act and the type of proprietary trading in which they are engaged. A banking entity is expected to bring the prohibited proprietary trading activity of a trading unit into compliance with the requirements of the proposed rule as soon as practicable within the conformance period. A trading unit may not expand its activity to include prohibited proprietary trading after the effective date of the proposed rule. Similarly, a trading unit that is not identified as engaging in proprietary trading as of the effective date may not begin engaging in such activity after the effective date.

With respect to a covered fund activity or investment, the conformance period (or, in the case of an illiquid fund for which a banking entity has received Board approval, the extended transition period) generally permits a banking entity to retain an existing investment in a covered fund, make additional capital contributions to a covered fund if contractually obligated to do so, or continue certain existing relationships with a covered fund.[356] However, pursuant to the conformance period or extended transition period, a banking entity may not make a new investment or capital contribution that it is not contractually obligated to make in, or establish a new relationship with, a covered fund after the effective date of the proposed rule.[357]

Request for Comment

In light of the interplay between the Board's Conformance Rule and the current proposed rule, the Board is requesting comment on whether any of the conformance provisions should be revised. In particular, the Board requests comment on the following question:

Question 347. Should any portion of the Board's Conformance Rule be revised in light of other elements of the current proposed rule? If so, why and how?

IV. Request for Comments

The Agencies are interested in receiving comments on all aspects of the proposed rule.

V. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the OCC, Board and FDIC to use plain language in all proposed and final rules published after January 1, 2000. The OCC, Board and FDIC invite public comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

[351] *See Conformance Period for Entities Engaged in Prohibited Proprietary Trading or Private Equity Fund or Hedge Fund Activities,* 76 FR 8265 (Feb. 14, 2011).

[352] *See id.* (citing 156 Cong. Rec. S5898 (daily ed. July 15, 2010) (statement of Sen. Merkley)).

[353] *See* Board proposed rule §§ __.30 to __.32.

[354] *See* Board's Conformance Rule §§ 225.180(a)–(c), (e).

[355] *See* proposed rule §§ __.2(e), (f), (p); __.10(b)(1).

[356] For instance, under the Board's Conformance Rule and the current proposed rule, a banking entity may retain an existing ownership interest in a covered fund under authority of the conformance period or extended transition period without regard to the per-fund or aggregate fund limitations contained in § __.12 of the proposed rule. Additionally, a banking entity may continue to serve as sponsor to a covered fund under authority of the conformance period, but only if the banking entity acted as sponsor to such fund as of the effective date of section 13 of the BHC Act and the nature of the relationship was continuous. A banking entity may also serve as sponsor of an illiquid fund pursuant to the extended transition period, but only to the extent such service is related to the banking entity's retention of its permitted ownership interest in such fund.

[357] In the case of a covered fund that a banking entity organizes and offers, or begins to act as sponsor to, after the effective date of section 13 of the BHC Act, the banking entity must comply with the requirements of the proposed rule with respect to its relationships with, and acquisition and retention of an ownership interest in, such covered fund. For instance, after the effective date of section 13 of the BHC Act, a banking entity may only acquire and retain an ownership interest in that covered fund as a permitted investment only (i) if the banking entity organizes and offers or acts as sponsor to that fund, and (ii) in compliance with the per-fund limitation and aggregate fund limitation of the proposed rule. Similarly, a banking entity's relationship with such covered fund would be subject to the limitations contained in the proposed rule.

VI. The Economic Impact of the Proposed Rule Under Section 13 of the BHC Act—Request for Comment

Section 13 of the BHC Act imposes on all banking entities prohibitions and restrictions on proprietary trading and certain interests in, and relationships with, a covered fund,[358] which apply to banking entities whether or not the Agencies adopt implementing rules. In formulating the proposed rule to implement these provisions, which is required by statute, the Agencies have chosen a multi-faceted approach to establish a regulatory framework that provides for clear, robust, and effective implementation of the statute's provisions in a consistent manner, while also not unduly constraining the ability of banking entities to engage in permitted activities and investments.[359] The Agencies have proposed this approach after considering the Council's findings and recommendations regarding how to implement section 13 of the BHC Act and a variety of alternatives described throughout this Supplemental Information.[360] The Agencies seek comment, in particular, on the potential costs and benefits of those aspects of the proposed rule that involve choices made, or the exercise of discretion, by the Agencies in implementing section 13 of the BHC Act.

The Agencies recognize that there are economic impacts that may arise from the proposed rule and its implementation of section 13 of the BHC Act and invite comment on the manner in which the proposed rule implements section 13 of the BHC Act, including commenters' views on the potential economic impacts discussed in this Part of the Supplemental Information. In addition, the Agencies seek comment on whether the proposed rule represents a balanced and effective approach to implementing section 13 of the BHC Act or whether alternative approaches to implementing section 13 of the BHC Act exist that would provide greater benefits or involve fewer costs, consistent with the statutory purpose. We also request comment on the potential competitive effects of the manner in which the proposed rule implements the statute.[361]

In addition to the questions posed throughout Part II of the Supplemental Information with respect to the potential costs and benefits of particular aspects of the statute and proposed rule, in order to assist in the analysis of the economic impacts associated with the final rule and any alternatives the Agencies may evaluate, the Agencies encourage commenters to provide quantitative information about the rule's impact on banking entities, their clients, customers, and counterparties, specific markets or asset classes, and any other entities potentially affected by the proposed rule with respect to:

1. The direct and indirect costs and benefits of compliance with section 13 of the BHC Act, as proposed to be implemented;

2. The effect of section 13 of the BHC Act, as proposed to be implemented, on competition; and

3. Any other economic impacts of the proposal.

In addition, to assist with potential estimates of the proposed rule's quantitative impacts, we request specific comment on: (i) The extent to which banking entities currently engage in proprietary trading activity or covered funds activities or investments that are prohibited or restricted by the statute, or have otherwise divested or conformed such activities; and (ii) the potential costs and benefits or other quantitative impacts of various aspects of the proposed rule, such as the compliance program requirement, the required reporting of quantitative measurements, and the conditions and requirements for relying on the proposed exemptions.

To further facilitate public comment on the economic effects of the manner in which the proposed rule implements the statute, the Agencies have identified below a number of significant aspects of the proposed rule and potential economic impacts that may result from section 13 of the BHC Act's requirements, as proposed to be implemented. We seek commenters' views on the likelihood of the potential economic impacts identified in this Part and whether there are additional costs, benefits, or other impacts that may arise from the proposed rule. To the extent that such costs, benefits, or other impacts are quantifiable, commenters are encouraged to identify, discuss, analyze, and supply relevant data, information, or statistics related to such costs, benefits, and other impacts and the quantification of such costs, benefits, and other impacts. In addition, commenters are asked to identify or estimate start-up, or non-recurring, costs separately from costs or effects they believe would be ongoing.

A. Proprietary Trading Provisions

1. Definition of Trading Account

Section __.3 of the proposed rule, which implements the statutory definition of ''trading account,'' provides a multi-pronged definition of that term that is intended to ensure that banking entities do not engage in ''hidden'' proprietary trading by characterizing trading activity as being conducted outside a trading account. In addition to positions taken principally for the purpose of short-term resale, benefitting from short-term price movements, realizing short-term arbitrage profits, or hedging another trading account position, the proposed definition also includes: (i) With respect to a banking entity subject to the Federal banking agencies' Market Risk Capital Rules, all positions in financial instruments subject to the prohibition on proprietary trading that are treated as ''covered positions'' under those capital rules, other than certain foreign exchange and commodities positions; and (ii) all positions acquired or taken by certain registered securities and derivatives dealers (or, in the case of financial institutions that are government securities dealers, that have filed notice with an appropriate regulatory agency) in connection with their activities that require such registration or notice. Although these prongs of the definition are proposed to prevent evasion of the statutory requirements, we seek comment on the extent to which either of these two prongs may create a competitive disadvantage for certain banking entities vis-à-vis competitors that are either not subject to section 13 of the BHC Act and/or competitors subject to different prongs of the proposed definition.

2. Exemption for Underwriting Activities

Section 13(d)(1)(B) of the BHC Act provides an exemption from the prohibition on proprietary trading for purchases and sales in connection with underwriting activities, to the extent

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[358] As noted above in connection with the conformance and extended transition periods, the proposed rule would not require an immediate application of these restrictions for any activity or investment entered into prior to the effective date of section 13 of the BHC Act (July 21, 2012). However, any activity or investment entered into after the effective date would be required to comply with section 13 of the BHC Act and the proposed rule, if adopted. *See* Supplemental Information Part III.E.

[359] *See* Supplemental Information Part II.A.

[360] *See* 12 U.S.C. 1851(b)(2)(A); *see also* Financial Stability Oversight Council, Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds (Jan. 2011), *available at http://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf.*

[361] For example, implementation of section 13(d)(1)(H) of the BHC Act may result in a competitive advantage for foreign-controlled banking entities over U.S.-controlled banking entities with respect to activities that occur solely outside of the United States.

that such activities are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties. In implementing this exemption in § __.4(a) of the proposed rule, the Agencies have endeavored to establish a regime that clearly sets forth the requirements for relying on the underwriting exemption established in the statute to facilitate banking entities' compliance with the statutory requirements. In considering potential requirements for the underwriting exemption, and assessing the potential economic impacts of each such requirement, the Agencies strived to propose an appropriate balance between considerations related to: (i) The potential for evasion of the statutory prohibition on proprietary trading through misuse of the underwriting exemption; and (ii) the potential costs that may arise from constraints on legitimate underwriting activities.

The Agencies have proposed to use, wherever practicable, common terms from existing laws and regulations in the context of underwriting to facilitate market participants' understanding and use of the exemption and to promote consistency across laws and regulations. Specifically, the proposed definitions of ''distribution'' and ''underwriter'' established in the proposed rule largely mirror the definitions provided for these terms in the SEC's Regulation M. Because the proposed rule uses a modified version of the Regulation M definition of ''underwriter'' to include selling group members, the proposed definition would permit the current market practice of members of the underwriting syndicate entering into an agreement with other selling group members to collectively distribute the securities, rather than requiring all members of a distribution to join the underwriting syndicate.

In addition, the definition of ''distribution'' from Regulation M that the Agencies have proposed in § __.4(a) of the proposed rule is intended to ensure that the underwriting exemption does not unduly constrain banking entities from providing underwriting services, while at the same time preventing banking entities from relying on the underwriting exemption to evade the proposed rule and the statutory prohibition on proprietary trading. The Agencies anticipate that the proposed approach to implementing the underwriting exemption should permit legitimate forms of underwriting in which market participants currently engage and, thus, should not unduly burden capital formation. In addition, the proposed rule would permit underwriters to continue to employ existing practices to stabilize a distribution of securities, which stabilization promotes confidence among issuers, selling security holders, and investors and further supports capital formation.

Under the proposed rule, the underwriting activities of a banking entity must be designed to generate revenues primarily from fees, commissions, underwriting spreads or other income, not from appreciation in value of covered financial positions that the banking entity holds related to such activities or the hedging of such covered financial positions. This proposed requirement should promote investor confidence by ensuring that the activities conducted in reliance on the underwriting exemption are designed to benefit the interests of clients seeking to bring their securities to market, not the interests of the underwriters themselves. The proposed requirement should also help prevent evasion of the statutory prohibition on proprietary trading, as trading activity designed to generate revenues from appreciation in the value of positions held by the banking entity would be indicative of prohibited proprietary trading, not underwriting activity. We seek comment on whether this approach of identifying underwriting activity by reference to revenue source could also make underwriting less profitable to the extent that it precludes or discourages certain types of profitability for *bona fide* underwriting services.

In addition to commenters' views on the potential economic impacts identified above, we request comment on whether the proposed rule may cause some banking entities to choose to decrease the supply of underwriting services in response to potential costs of the proposed rule and whether this result would adversely affect competition among underwriters or have a harmful impact on capital formation. In addition, if banking entities were to pass the increased costs of complying with the proposed exemption on to issuers, selling security holders, or their customers, we seek comment on whether the effect would be to increase the cost of raising capital and whether this would harm capital formation to the extent that such cost increases were sufficient to preclude issuers from accessing the capital markets. As described above, the Agencies have designed the proposal to balance such potential costs with provisions intended to permit banking entities' legitimate underwriting activities to continue as provided by the statute, while also establishing sufficient requirements to prevent evasion of the statutory goals through misuse of the underwriting exemption.

3. Exemption for Market Making-Related Activities

Section 13(d)(1)(B) of the BHC Act provides an exemption from the prohibition on proprietary trading for purchases and sales in connection with market making-related activities, to the extent that such activities are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties. In setting forth the requirements for eligibility for this exemption in § __.4(b) of the proposed rule, the Agencies have endeavored to establish a regime that clearly sets forth the requirements for relying on the exemption for market making-related activity established in the statute to facilitate banking entities' compliance with the statutory requirements. In considering potential requirements for the market-making exemption, and assessing the potential economic impacts of each such requirement, the Agencies tried to strike an appropriate balance between considerations related to: (i) The potential for evasion of the statutory prohibition on proprietary trading through misuse of the exemption for market making-related activity; (ii) the potential difficulties related to distinguishing market making-related activity from prohibited proprietary trading; and (iii) potential costs that may arise from constraints on legitimate market making-related activities.

The Agencies have proposed to use, where practicable, terms and concepts used in current laws and regulations in the context of market making to promote clarity and consistency. Recognizing that there are differences in market making activities between different types of asset classes (e.g., liquid and illiquid instruments) and market structures (e.g., organized trading facilities and the over-the-counter markets), the Agencies have proposed to implement the market-making exemption in a manner that accounts for these distinctions and permits market making activities in different asset classes and market structures. Permitting legitimate market making in its different forms should promote market liquidity and efficiency by allowing banking entities to continue to provide customer intermediation and liquidity services in both liquid and illiquid instruments. The Agencies also recognize, however, that market making-related activities in the over-the-counter markets or activities involving less liquid instruments are sometimes less transparent than similar activities on

organized trading facilities or in liquid markets. We seek comment on whether, in order to comply with the statutory prohibition on proprietary trading, some banking entities may be inclined to abstain from some market-making activities in an effort to reduce the risk of noncompliance. We also request comment on whether, if banking entities did so, this could result in reduced liquidity for certain types of trades or for certain less liquid instruments.

In addition, the proposed exemption permits anticipatory market making, block positioning, and hedging of market making positions under certain circumstances, which should further facilitate customer intermediation and market liquidity and efficiency. However, certain conditions are placed on such market making-related activities in the proposal in an effort to ensure that such activities are, in fact, market making-related activities, and are not hidden proprietary trading activities subject to the statutory prohibition.

The proposal requires that the market making-related activities be designed to generate revenues primarily from fees, commissions, bid/ask spreads or other income not attributable to appreciation in the value of covered financial positions a banking entity holds in trading accounts or the hedging of such positions. This proposed requirement should promote investor confidence by helping to ensure that market making serves customer needs. The proposed requirement should also help prevent evasion of the statutory prohibition on proprietary trading, as trading activity designed to generate revenues from appreciation in the value of positions held by the banking entity would be indicative of prohibited proprietary trading, not market making-related activity. The Agencies request comment on whether this approach of identifying market making activity by reference to a market making trading unit's revenue source would also make market making activity less profitable and whether it would preclude or discourage certain types of profitability for *bona fide* market making services. Commenters should also address whether this requirement would reduce the willingness of some banking entities to continue to provide market making-related services and whether this could reduce liquidity, harm capital formation, or make market making-related services more expensive. The Agencies note that, in order to balance the potential for such effects with the statutory purpose, the proposed rule does not expressly prohibit all types of non-client income, and recognizes that the precise type and source of revenues generated by *bona fide* market making services can and will vary depending on the relevant market, asset, and facts and circumstances.

4. Exemption for Risk-Mitigating Hedging Activities

Section 13(d)(1)(C) provides an exemption from the prohibition on proprietary trading for risk-mitigating hedging activities in connection with and related to individual or aggregated positions, contracts, or other holdings of a banking entity that are designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings. The proposed exemption requires that the hedging transaction be reasonably correlated to these risks that the transaction is intended to hedge or otherwise mitigate. This proposed requirement is intended to address the potential for misuse of the exemption where a transaction is not closely tied to risk mitigation, while also providing some flexibility in the degree of correlation that is required in order to promote consistency with the statutory goals and requirements.

In addition, the proposed exemption requires that the hedging transaction: (i) Not give rise, at the inception of the hedge, to significant exposures that are not themselves hedged in a contemporaneous transaction; and (ii) be subject to continuing review, monitoring, and management. Together, these proposed requirements are designed to ensure that a banking entity does not use the hedging exemption to conduct prohibited proprietary trading in the guise of hedging activity and to prevent evasion of the proprietary trading prohibition contained in section 13 of the BHC Act and the proposed rule. These proposed requirements are intended to ensure that an exempt hedging transaction will mitigate, not amplify, risk. Moreover, such requirements should further the goals of compliance with the statutory requirements and reducing banking entities' risks.

We seek comment on whether the proposed requirements for relying on the hedging exemption are more restrictive than necessary to implement the statutory language and purpose, and to prevent evasion of the statutory provisions, and whether a banking entity's hedging activities could be unduly constrained by the proposed rule. Further, commenters should address the extent to which a banking entity may be unable or unwilling to execute certain hedges and whether, as a result, a banking entity could be limited in its means to reduce its risk. In addition, would banking entities be dissuaded from engaging in other permitted activities or activities outside the scope of the statute (e.g., long-term investments) if the requirements of the proposed hedging exemption unduly limits or prevents them from mitigating the risks associated with such activities? We request comment on whether a reduction in efficiency could result from a reduced ability of covered banking entities to transfer risks to those more willing to bear them. Commenters should also address whether the proposed rule would reduce a banking entity's willingness to engage in permitted risk-mitigating hedging activities in order to avoid costs related to ensuring compliance with the exemption's requirements and whether this would increase the banking entity's risk exposure. In order to balance the potential for such effects with the statutory purpose, the proposed rule attempts to implement the risk-mitigating hedging exemption in a manner that recognizes that the precise nature and execution of risk mitigation through hedging transactions can and will vary depending on the relevant market, asset, and facts and circumstances, while also establishing requirements designed to ensure that transactions relying on the hedging exemption are, in fact, hedges and not hidden proprietary trading prohibited by the statute.

The proposed exemption would require documentation with respect to hedges established at a different level of organization than that responsible for the underlying positions or risks that are being hedged. This proposed documentation requirement is intended to facilitate review by banking entities and Agency supervisors and examiners in assessing whether the hedge position was established to hedge or otherwise mitigate another unit's risks. Without such documentation, there could be an increased risk of evasion of the statute's prohibition on proprietary trading, as it would be difficult to assess whether a purported hedging transaction was established to mitigate another level of organization's risk or solely to profit from price appreciation of the position established by the purported hedge. We seek comment on the costs of the proposed documentation requirement for certain hedging transactions, such as the costs related to systems changes and maintenance, employee resources and time, and recordkeeping.[362] The

[362] The Agencies note that, for some costs of the proposed rule, hour burden estimates are provided in Part [internal cite to PRA] of this Supplementary

Agencies also request comment on the extent to which the proposed documentation requirement would reduce the speed in which a banking entity could execute a hedge at a different level within the entity and whether this could reduce efficiency or result in a banking entity being exposed to a greater amount of risk. Further, we seek commenters' views on whether potentially slower execution times could also reduce profitability associated with the position as it remains unhedged (or, alternatively, increase profitability, depending on whether the value of the unhedged position is increasing or decreasing in the market). To balance the potential for such consequences with the statutory purpose, the Agencies have proposed to apply the documentation requirement to only a subset of hedging transactions that pose the greatest compliance risk (i.e., hedges that are established at a different level of organization than that establishing or responsible for the underlying positions or risks that are being hedged). In addition, the Agencies expect that the preparation of required documentation would become less burdensome and more efficient over time as systems are developed and personnel become more accustomed to the proposed requirement.

5. Compensation Related to Permitted Activities

The proposed rule would require that the compensation arrangements of persons performing underwriting, market making-related, and risk-mitigating hedging activities be designed not to reward proprietary risk-taking. These proposed requirements are intended to reduce incentives for personnel of the banking entity to violate the statutory prohibition on proprietary trading and expose the banking entity to risks arising from prohibited proprietary trading. We request comment on whether the proposed rule's requirements regarding compensation arrangements would reduce the banking entity's ability to attract talented and experienced trading personnel or would harm the banking entity's ability to compete with entities that are not subject to section 13 of the BHC Act and the proposed rule. In order to balance the potential for such effects with the statutory goals, the proposed rule does not expressly prescribe how a banking entity must compensate its personnel or prohibit all types of compensation incentives related to non-client income, but instead proposes an approach that leaves banking entities with a degree of flexibility to compensate their personnel as they deem appropriate.

6. Exemption for Trading on Behalf of Customers

Section __.6(b) of the proposed rule implements section 13(d)(1)(D) of the BHC Act, which permits a banking entity, notwithstanding the prohibition on proprietary trading, to purchase or sell a covered financial position on behalf of customers. Because the statute does not define when a transaction would be conducted on behalf of customers, the proposed rule identifies three categories of transactions that would qualify under this exemption. By providing that only transactions meeting the terms of the three categories would be considered to be on behalf of customers for purposes of the exemption, the proposed rule addresses the potential for evasion of the statutory prohibition. At the same time, the proposed rule also would not permit banking entities to rely on the exemption with respect to other, unanticipated transactions that banking entities may undertake on behalf of customers. The Agencies seek comment on whether banking entities currently engage in principal transactions on behalf of customers that are not covered by the proposed exemption or other permitted activities and whether the lack of an exemption in the proposed rule for such activities would impact beneficial customer facilitation, market liquidity, efficiency, or capital formation.

7. Exemption for Trading Outside of the United States

Section __.6(d) of the proposed rule implements section 13(d)(1)(H) of the BHC Act, which permits certain foreign banking entities to engage in proprietary trading that occurs ''solely outside of the United States.'' The proposed exemption provides a number of specific criteria for determining when trading will be considered to have occurred solely outside of the United States to help prevent evasion of the statutory restriction. The proposed exemption also provides a definition of ''resident of the United States'' that is similar to the SEC's definition of ''U.S. person'' in Regulation S, which should promote consistency and understanding among market participants that have experience with the concept from the SEC's Regulation S. In addition, the proposed exemption clarifies when a foreign banking entity will be considered to engage in such trading pursuant to sections 4(c)(9) and 4(c)(13) of the BHC Act, as required by the statute, including with respect to a foreign banking entity that is not a ''foreign banking organization'' under the Board's Regulation K. This implementation of section 13(d)(1)(H) of the BHC Act would permit certain foreign banking entities that are not ''qualifying foreign banking organizations'' under the Board's Regulation K to also rely on the exemption, notwithstanding the fact such foreign banking entities are not currently subject to the BHC Act generally or the Board's Regulation K. As a result, such foreign banking entities should encounter fewer costs related to complying with the proprietary trading prohibitions than if they were unable to rely on the exemption in section 13(d)(1)(H) of the BHC Act.

Despite the reference to section 4(c)(13) of the BHC Act, the statute provides that the exemption for trading outside of the United States is only available to banking entities that are not directly or indirectly controlled by U.S. banking entities (i.e., not any U.S. banking entities or their foreign subsidiaries and affiliates). Under the statute, the prohibition on proprietary trading applies to the consolidated, worldwide operations of U.S. firms. As required by statute, the proposal prohibits U.S. banking entities from engaging in proprietary trading unless the requirements of one or more relevant exemptions (other than the exemption for trading by foreign banking entities) are satisfied. As a result, the statute creates a competitive difference between the foreign activities of U.S. banking entities, which must monitor and limit their foreign activities in accordance with the requirements of section 13 of the BHC Act, relative to the foreign activities of foreign-based banking entities, which may not be subject to restrictions similar to those in section 13 of BHC Act. The Agencies seek commenters' views on whether the proposed rule's implementation of section 13(d)(1)(H) of the BHC Act imposes additional competitive differences, beyond those recognized above, and the potential economic impact of such competitive differences.

8. Quantitative Measurements

Section __.7 of the proposed rule, which implements in part section 13(e)(1) of the BHC Act,[363] requires

Information for purposes of the Agencies' compliance with the Paperwork Reduction Act.

[363] Section 13(e)(1) of the BHC Act requires the Agencies to issue regulations regarding internal controls and recordkeeping to ensure compliance with section 13. *See* 12 U.S.C. 1851(e)(1). Section

Continued

certain banking entities to comply with the reporting and recordkeeping requirements specified in Appendix A of the proposed rule. Proposed Appendix A requires a banking entity with significant trading activities to furnish periodic reports to the relevant Agency regarding various quantitative measurements of its trading activities and create and retain records documenting the preparation and content of these reports. The proposed measurements would vary depending on the scope, type, and size of trading activities. In addition, proposed Appendix B contains a detailed commentary regarding the characteristics of permitted market making-related activities and how such activities may be distinguished from trading activities that, even if conducted in the context of banking entity's market making operations, would constitute prohibited proprietary trading. These proposed requirements are intended, in particular, to address some of the difficulties associated with (i) identifying permitted market making-related activities and distinguishing such activities from prohibited proprietary trading and (ii) identifying certain trading activities resulting in material exposure to high-risk assets or high-risk strategies. In combination, § __.7 and Appendix A of the proposed rule provide a quantitative overlay designed to help banking entities and the Agencies identify trading activities that warrant further analysis or review in a variety of levels and contexts.

The various quantitative measurements that would be required to be reported focus on assessing banking entities' risk management, sources of revenue, revenues in relation to risk, customer servicing, and fee generation. Aberrant patterns among the measurements with respect to these areas would warrant further review to determine whether trading activities have occurred that are proprietary in nature and whether such activities may be exposing banking entities to disproportionate risk. For example, quantitative measurements should provide banking entities with a useful starting point for assessing whether their trading activities are consistent with the proposed rule and whether traders are exposing the entity to disproportionate risks. In addition, proposed Appendix A applies a standardized description and general method of calculating each quantitative measurement that, while taking into account the potential variation among trading practices and asset classes, is intended to facilitate reporting of sufficiently uniform information across different banking entities so as to permit horizontal reviews and comparisons of the quantitative profile of trading units across firms. This proposed approach, which recognizes that quantitative measurements must be applied with respect to differences within a banking entity's structure, business lines, and trading desks, should facilitate efficient application within firms and efficient examination across firms. The proposed use of a suite of quantitative measurements for these purposes may also limit erroneous indications of potential violations or erroneous indications of compliance (i.e., false positives and false negatives), thus allowing banking entities and examiners and supervisors to focus upon the measurements that may be most relevant in identifying prohibited conduct. The uniformity of the proposed measurements across different types of banking entities is also intended to ensure that banking entities are calculating comparable measurements consistently and that comparable measurements are being evaluated consistently by Agencies. The Agencies expect that as the implementation of quantitative measurements and the internal compliance and external oversight processes become more efficient over time, banking entities will find compliance efforts less burdensome.

The Agencies seek comment on the extent to which banking entities will incur costs associated with implementing, monitoring, and attributing financial and personnel resources for purposes of complying with the requirements of proposed Appendix A. Specifically, please discuss the extent to which banking entities are unlikely to currently calculate certain quantitative measurements in the manner required under the proposal (e.g., Spread Profit and Loss or Customer-facing Trade Ratio) and whether this may result in significant start-up costs associated with developing these measurements. Under the proposal, banking entities would also need to dedicate personnel and supervisory staff to review for potential aberrant patterns of activity that warrant further review, as well as maintain appropriate records of that review. In order to limit these calculation and surveillance costs to the greatest extent practicable, the Agencies have proposed measurements that, in many cases, are already calculated by many banking entities to measure and manage trading risks and activities. The costs to banking entities associated with calculating the proposed quantitative metrics should also be mitigated by the tiered application of Appendix A, which would require banking entities with the most extensive trading activities to report the largest number of quantitative measurements, while imposing fewer or no reporting requirements on banking entities with smaller trading activities. By limiting the application of aspects of Appendix A to firms with greater than $1 billion in trading assets and liabilities, and all aspects of the appendix only to entities with greater than $5 billion in trading assets and liabilities, the costs imposed should be proportional to the market reach and complexity of a banking entity's trading activities.

B. Covered Fund Activities

Subpart C implements the statutory provisions of section 13(a)(1)(B) of the BHC Act, which prohibit banking entities from acquiring or retaining any equity, partnership, or other ownership interest in, or sponsoring, a covered fund, and other provisions of section 13 of the BHC Act which provide exemptions from, or otherwise relate to, that prohibition. In implementing the covered funds provisions of section 13 of the BHC Act, the Agencies have proposed to define and interpret several terms used in implementing these provisions and the goals of section 13. We seek comment on whether the proposed rule represents a balanced and effective approach to implementing the covered fund provisions of the statute.

1. General Scope

For banking entities that invest in, sponsor or have relationships with one or more covered funds, the economic impact of complying with the statute and the implementing rule will vary, depending on the size, scope and complexity of their respective business, operations and relationships with clients, customers and counterparties. Moreover, the types of covered funds advised or sponsored by an adviser, the types of business and other relationships that an adviser may conduct with such funds and the adviser's other business activities, including relationships with other third party advised covered funds, will affect whether a covered fund activity would be subject to the statutory prohibition, eligible for a particular exemption or subject to particular internal control requirements as specified by the proposed rule.

For example, with respect to a banking entity that does not ''sponsor,''

__.20 and Appendix C of the proposed rule also implement section 13(e)(1) of the BHC Act.

invest in, or otherwise provide ''prime brokerage transactions'' to, a ''covered fund,'' the statute, as implemented by the proposed rule, would not substantively restrict the banking entity's activity; instead, the proposed rule would only require the minimum internal controls reasonably designed to prevent the entity from engaging in the prohibited activities. As a result, we do not expect that the proposed rule would have a significant effect on most banking entities, such as investment advisers, that are primarily engaged in providing *bona fide* trust, fiduciary, or advisory services to unrelated parties. Although such advisers may incur some incremental costs to develop and implement a compliance program reasonably designed to ensure that they do not engage in otherwise prohibited activities, there should be no significant costs associated with modifying existing business practices and procedures. We request comment on the extent to which such banking entities would be required to modify their existing business practices and procedures to comply with the proposed rule. For instance, would a registered investment adviser that only advises registered investment companies and that does not trade for its own account incur costs, benefits or other impacts in addition to costs to implement the minimum internal controls reasonably designed to prevent it from engaging in prohibited activities? Would an adviser that trades on behalf of itself incur, with respect to such trading activities, additional costs, benefits or other impacts described above relating to the proposed restrictions on proprietary trading?

In contrast, a banking entity that seeks to invest in a covered fund could only do so in reliance on an exemption specified in the statute or the proposed rule, such as the exemption for organizing and offering certain covered funds provided in section 13(d)(1)(G), as implemented in § __.11 of the proposed rule. Similarly, a banking entity that seeks to enter into ''prime brokerage transactions'' with a covered fund could only do so by meeting certain requirements under the proposed rule. Accordingly, the economic impact of the proposed rule will depend on whether an adviser's activities fall within the scope of the terms as proposed such that the banking entity would be subject to the limitations on covered fund activities. To the extent that these terms or exemptions would result in more, or fewer, activities being captured by the proposed rule, what are the attendant costs and benefits that a covered banking may incur? We request commenters provide empirical data where possible.

Definition of Covered Fund. The proposed rule's definition of ''covered fund'' includes hedge funds and private equity funds as defined by statute, but also identifies two types of similar funds—commodity pools and certain non-U.S. funds—that are subject to the covered fund restrictions and prohibitions of section 13 of the BHC Act, as implemented by the proposed rule. The Agencies have proposed to include these funds since they are generally managed and structured similar to a covered fund, but are not generally subject to the Federal securities laws due to the instruments in which they invest or the fact that they are not organized in the United States or one or more States. We request comment on whether applying the definition of covered fund in this way as proposed would increase the number of investment vehicles or similar entities that would be subject to the limitations under the proposed rule. Would this approach increase compliance costs for banking entities that sponsor, invest in, or have certain relationships with these types of funds?

The proposed rule also excludes certain types of investments in covered funds, pursuant to section 13(d)(1)(J) of the BHC Act, which authorizes the Agencies to exclude from the general covered fund activity prohibition those activities that would promote the safety and soundness of a banking entity. Section __.14 of the proposed rule would exclude from the prohibition, among other things, a banking entity's investments in covered funds related to bank owned life insurance, certain joint ventures and interests in securitization vehicles retained in compliance with the minimum credit risk retention requirements of section 15G of the Exchange Act. We request comment on the potential economic impact of the proposal to exclude these types of investments from the general prohibition. For banking entities whose only covered fund activities are those described in § __.14, what economic impact would be attributed to complying with this provision of the proposed rule? Would these costs and benefits differ from those of banking entities that conduct covered fund activities as well as engage in activities described in § __.14? As described in the Supplementary Information, a banking entity that generally does not engage in any prohibited activities is only required to adopt and implement a compliance program reasonably designed to ensure that the entity does not engage in prohibited activities. To what extent will the proposed provisions in § __.14 increase or mitigate any costs, benefits or other impacts associated with the foregoing minimum internal controls requirement?

Definition of Sponsor. Under the proposed rule, the term ''sponsor'' is defined by incorporating the definition set forth in section 13(h)(5) of the BHC Act, but the Agencies have proposed to clarify that the term trustee, as used in the definition of sponsor, does not include a trustee that does not provide discretionary investment services to a covered fund. This exception distinguishes a trustee providing non-discretionary advisory services from trustees providing services similar to those associated with entities serving as general partner, managing member, commodity pool operator or investment adviser of a covered fund. We request comment on the economic impact associated with the proposed definition of ''sponsor.'' Will the economic impact differ depending on the scope of a banking entity's covered fund activities? For example, a banking entity whose only relationship with a covered fund involves the provision of non-discretionary investment services would not be a sponsor under the proposed rule. We request comment on whether such a banking entity would benefit from this exception. We also request comment on whether a covered fund's investors and counterparties would bear any costs associated with a banking entity's modification of its business practices or its relationship to the covered fund.

Other Definitions. The covered fund provisions also define, among other things, ''director'' and ''prime brokerage transaction.'' What are the costs, benefits or other impacts associated with the way the proposed rule defines these terms? For example, would the proposed definition of ''prime brokerage transaction'' enable a banking entity to provide services to a covered fund that would not ordinarily be understood to be prime brokerage as long as it met certain conditions? What costs, or benefits, for banking entities, clients, customers or counterparties may be associated with this approach to defining prime brokerage transaction?

2. Exemptions

In implementing the covered funds provisions of section 13 of the BHC Act, the Agencies also have interpreted or defined terms contained in the three principal exemptions related to covered fund activities by a banking entity: (i) The exemption for organizing and offering covered funds; (ii) the

exemption for investment in a covered fund in the case of risk-mitigating hedging; and (iii) the exemption for covered fund activities outside of the United States. We request comment generally on the potential impact of these statutory exemptions, as implemented by the proposed rule. The Agencies note that there are multiple factors that could affect the impact of the statute and the proposed rule on a banking entity's covered fund activities, including other conditions set forth in the statute or the proposed rule that could mitigate costs or enhance benefits associated with a particular element or condition of an exemption.

Organize and Offer Exemption. Section __.11 of the proposed rule implements the exemption set forth in section 13(d)(1)(G) of the BHC Act and generally incorporates all of the conditions specified in the statute. As required by the statute, the exemption for organizing and offering covered funds is available only to banking entities that provide *bona fide* trust, fiduciary, commodity trading or investment advisory services, which must meet certain requirements. As a result, the exemption should not preclude banking entities, such as registered advisers or other advisers, from providing trust or advisory services to their clients. We request comment on whether the proposed requirements of the exemption would result in a banking entity modifying its business practices or bearing higher costs to comply with the limitations and requirements applicable to this statutory exemption, as implemented by the proposed rule. These costs may include, for example, developing a credible plan that documents how advisory services would be provided to banking entity customers through organizing and offering covered funds and making the specified disclosures required by the exemption. We also request comment on whether the banking entity will pass these costs on to covered fund investors and counterparties.

In implementing this statutory exemption, the Agencies have defined or clarified several key terms or requirements, including (i) the definition of ownership interest and (ii) the method for calculating the 3% ownership interest limit. The proposed definition of ownership interest is designed to describe the typical types of relationships through which an investor has exposure to the profits and losses of a covered fund. Consistent with this approach, carried interest is not included within the proposed definition of ownership interest. As discussed in the Supplementary Information above, carried interest generally entitles service providers, such as banking entities that provide advisory services, to receive compensation for such services determined as a share of a covered fund's profits. As a result, the proposed rule does not treat carried interest as an ownership interest, which could have costs and benefits. To help discern these costs and benefits, we request comment on whether this is consistent with how providers of advisory services view the receipt of such ''carried interest'' (i.e., as compensation for services rather than as an ''ownership interest'' equivalent to an investor's interest that shares in a fund's profits and losses). The proposed definition of carried interest has limitations designed to prevent a banking entity from circumscribing the proposed rule's limitations on ownership. For instance, among other things, the proposed definition requires that the ''sole purpose and effect of the interest is to allow banking entity * * * to share in the profits of the covered fund.'' [364] For banking entities receiving compensation that would satisfy all of the elements of the proposed definition, there should be no burden associated with modifying existing business practices. For other banking entities, however, the conditions specified in the proposed definition could result in more banking entities being deemed to hold ''ownership interests'' and hence subject to the limitations under the statute and the proposed rule, including the limitations on material conflicts of interest, high-risk trading activities and exposure to high-risk assets. We request comment on whether these banking entities would need to modify their existing practices and develop alternatives, and, if so, whether these modifications will impose costs and benefits. For example, costs associated with modifying business practices could include developing and implementing a compliance program in accordance with the proposed rule; benefits that may arise as a result of modifying business practices could include limiting the extent to which material conflicts of interest may arise between clients, customer and counterparties of banking entities. We also request comment on whether such costs, if any, are likely to be passed on to fund investors, clients and counterparties.

As required by statute, a banking entity that seeks to invest in a covered fund under the exemption for organizing and offering covered funds could not, after the expiration of an initial one-year period (plus any applicable extensions), hold more than 3% of the total outstanding ownership interests of such fund. The proposed rule would require that a banking entity calculate the per-fund limit whenever the covered fund calculates its value or permits investor investments or redemptions, but in no case less frequently than quarterly. We request comment on whether this approach will limit any additional burden associated with calculating the per-fund limit for banking entities that invest in covered funds that determine their value on at least a quarterly basis. We also request comment on whether such banking entities will incur any additional significant costs in determining their compliance with the 3% ownership limitation.

Risk-mitigating Hedging Exemption. The proposed rule specifies an exemption from the general prohibition on covered fund activities in the case of risk-mitigating hedging. Similar to the hedging exemption in the case of proprietary trading (discussed above), the hedging exemption for covered fund activities specifies a number of conditions that are identical except for two conditions. In the case of the hedging exemption for covered fund activities, the hedging must generally ''offset'' the exposure of the banking entity to the liabilities associated with (i) the facilitation of customer transactions or (ii) compensation arrangements for certain employees. Consistent with the statute, the proposed exemption would enable a banking entity to invest in a covered fund without limit if the investment is for risk-mitigating hedging purposes.

We request comment on whether the proposed requirements will have benefits of furthering the goals of compliance with the statute and reducing banking entities' risks. We also request comment on whether the proposed requirements are more restrictive than necessary to implement the statute and whether they could unnecessarily limit a banking entity's hedging activities and ability to reduce risk. Commenters should also address whether the proposed requirements will dissuade banking entities from engaging in other permitted activities (e.g., organizing and offering covered funds) or those activities outside the scope of the statute to the extent that the exemption prevents them from mitigating the risks associated with such activities. We request comment on whether a reduction in efficiency could result from a reduced ability of covered banking entities to transfer risks to those more willing to bear them. Commentators should also address whether the proposed rule could reduce

[364] Proposed rule § __.10(b)(3)(i).

a banking entity's willingness to engage in permitted risk-mitigating hedging activities in order to avoid costs related to ensuring compliance with the exemption's requirements, and whether this would increase the banking entity's risk exposure.

Exemption for Covered Fund Activities Outside of the United States. Section __.13(c) of the proposed rule implements section 13(d)(1)(I) of the BHC Act, which permits certain foreign banking entities to sponsor or invest in covered funds ''solely outside of the United States,'' so long as the covered fund is not offered or sold to a resident of the United States. The proposed exemption provides a number of specific criteria for determining when a banking entity will be considered to have invested or sponsored a covered fund solely outside of the United States. The proposed exemption provides a definition of ''resident of the United States'' that is similar, but not identical, to the SEC's definition of ''U.S. person'' in Regulation S, which should promote consistency and understanding among market participants that have experience with the concept from the SEC's Regulation S. In addition, the proposed exemption clarifies when a foreign banking entity will be considered to engage in such trading pursuant to sections 4(c)(9) and 4(c)(13) of the BHC Act, as required by the statute, including with respect to a foreign banking entity that is not a ''foreign banking organization'' under the Board's Regulation K. This implementation of section 13(d)(1)(I) of the BHC Act would permit certain foreign banking entities that are not ''qualifying foreign banking organizations'' under the Board's Regulation K to also rely on the exemption, notwithstanding the fact such foreign banking entities are not currently subject to the BHC Act generally or the Board's Regulation K. As a result, such foreign banking entities should encounter fewer costs related to complying with the covered fund activity prohibitions than if they were unable to rely on the exemption in section 13(d)(1)(I) of the BHC Act.

Despite the reference to section 4(c)(13) of the BHC Act, the statute provides that the exemption for covered fund activities outside of the United States is only available to banking entities that are not directly or indirectly controlled by U.S. banking entities (i.e., not any U.S. banking entities or their foreign subsidiaries and affiliates). Under the statute, the prohibition and restrictions on covered fund activities apply to the consolidated, worldwide operations of U.S. firms. As required by statute, the proposal prohibits U.S. banking entities from investing in or sponsoring covered funds unless the requirements of one or more relevant exemptions (other than the exemption for trading by foreign banking entities) are satisfied. As a result, the statute creates a competitive difference between the foreign activities of U.S. banking entities, which must monitor and limit their foreign activities in accordance with the requirements of section 13 of the BHC Act, relative to the foreign activities of foreign-based banking entities, which may not be subject to restrictions similar to those in section 13 of BHC Act. The Agencies seek commenters' views on whether the proposed rule's implementation of section 13(d)(1)(I) of the BHC Act imposes additional competitive differences, beyond those discussed above, and the potential economic impact of such competitive differences.

3. Securitizations

The Agencies recognize that by defining ''covered fund'' and ''banking entity'' broadly, securitization vehicles may be affected by the restrictions and requirements of the proposed rule, and this may give rise to various economic effects. The Agencies preliminarily believe that the proposed rule should mitigate the impact of securitization market participants and investors in some non-loan asset classes (including, for example, banking entities that are participants in a securitization that may acquire or retain ownership interests in a securitization vehicle that falls within the definition of covered fund) by excluding loan securitizations from the restrictions on sponsoring or acquiring and retaining ownership interests in covered funds.

Costs may be incurred to establish internal compliance programs to track compliance for any securitization vehicle that falls within the definition of banking entity. These costs may be minimized for future securitization vehicles, however, because such securitizations may be able both to incorporate any internal compliance program requirements into their documentation prior to execution, and to minimize (or eliminate) any activities that may trigger greater compliance costs. The proposed rule should further minimize the costs of the internal compliance programs by (i) allowing for enterprise-wide compliance programs and minimal requirements for banking entities that do not engage in covered trading activities and/or covered fund activities or investments (each as described below), and (ii) allowing for reduced compliance program requirements by establishing financial thresholds for ''significant'' covered trading activities or covered fund activities or investments (as described below).

There could be initial costs both for banking entities that have an ownership interest in a securitization vehicle and for other securitization participants to determine if a particular vehicle falls within the definition of covered fund. Additional costs could be incurred to the extent that banking entities divest their ownership interests in any securitization vehicle that is a covered fund and is not otherwise eligible for one of the exceptions allowed under the proposed rule. This divestment could result in selling pressure that may have a negative impact on the market prices for the vehicles that fall within the definition of covered fund, which in turn could impact all investors in those securitization vehicles. Additionally, under the proposed rule banking entities would no longer be allowed to acquire and retain such ownership interests, which may result in fewer potential investors and reduced liquidity in the market for ownership interests in these covered funds.

For example, the proposed rule could lead to significant potential market impacts if, with respect to an issuance of asset-backed securities secured by assets which are not loans, the market requires credit risk retention in excess of the minimum requirements to be adopted pursuant to Section 941 of the Dodd-Frank Act (i.e., the market believes that 5% credit risk retention is insufficient to address potential misalignment of incentives in a particular transaction). In such circumstances, the proposed rule could reduce potential investors' demand for such securitizations and could make such securitizations more expensive.

C. Limitations on Permitted Activities for Material Conflicts of Interest and High-Risk Assets and High-Risk Trading Strategies

Section 13(d)(2)(A)(i) of the BHC Act provides that an otherwise-permitted activity would not qualify for a statutory exemption if it would involve or result in a material conflict of interest. The proposed rule's definition of material conflict of interest, as discussed in more detail in Part II of the **SUPPLEMENTARY INFORMATION**, would provide flexibility to banking entities and their clients, customers, and counterparties with respect to how transactions are structured, while also establishing a structure to prevent banking entities from engaging in transactions and activities in reliance on a statutory

exemption when the transaction or activity would have a materially adverse effect on the clients, customers, or counterparties of the banking entity. Specifically, the proposed definition would permit the use of timely and effective disclosure and/or information barriers in certain circumstances to address and mitigate conflicts of interest, while prohibiting transactions or activities where such a conflict of interest cannot be addressed or mitigated in the specified manner. The Agencies have endeavored to establish a workable definition that sets forth when a banking entity may not rely on an exemption because it would involve or result in a material conflict of interest, consistent with the statutory goals, to facilitate banking entities' compliance with the statutory requirements. We seek comment on whether the statutory prohibition, as implemented by the proposal, may impose costs on banking entities or their clients, customers, or counterparties. For instance, by permitting a client, customer or counterparty the option of negating or mitigating the conflict after the banking entity has disclosed the conflict, would the banking entity incur certain costs related to terminating the transaction, providing compensation or other means of mitigating the conflict, or administrative costs associated with negotiating the extent of any such compensation or other means of mitigating the conflict, depending on the actions of the client, customer, or counterparty in response to the disclosure?

In addition, section 13(d)(2)(A)(ii) of the BHC Act provides that an otherwise-permitted activity would not qualify for a statutory exemption if it would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies. This statutory limitation, as implemented in the proposed rule, would prevent a banking entity from engaging in certain high-risk activity. The Agencies request comment on whether the proposed definitions of high-risk asset and high-risk trading strategy would potentially reduce liquidity or create a reduction in efficiency for assets or markets related to that high-risk activity.

D. Compliance Program

Under § __.20 of the proposed rule, all covered banking entities that are engaged in covered trading activities or covered fund activities or investments would be required to have a compliance program that provides for the following six elements, at a minimum: (i) Internal written policies and procedures; (ii) internal controls; (iii) a management framework; (iv) independent testing; (v) training; and (vi) recordkeeping. For those banking entities with significant covered trading activities or covered fund activities or investments under § __.20(c) of the proposed rule, additional standards in proposed Appendix C must be met with respect to these six elements.[365] Collectively, the six proposed requirements would facilitate a banking entity's review and assessment of its compliance with section 13 of the BHC Act and the proposed rule, including identifying potential areas of deficiency in a banking entity's compliance program and providing the banking entity the opportunity to take appropriate corrective or disciplinary action, where warranted. The proposed compliance program would also facilitate Agency examination and supervision for compliance with the requirements of the statute and the proposed rule. By requiring that a banking entity have in place specific, documented elements (e.g., written policies and procedures and internal controls, recordkeeping requirements), the proposed rule would ensure that Agency examiners and supervisors can effectively review a banking entity's activities and investments to assess compliance and, where a banking entity is not in compliance with the proposed rule, take appropriate action.

Beyond the benefits recognized above, the individual elements of the proposed compliance program should also provide certain benefits. For example, the proposed management framework requirement is designed to give management a greater incentive to comply with the proposed rule and to ascertain that the employees they are responsible for overseeing are also complying with the proposed rule. Further, by establishing a management framework for compliance, the banking entity would be required to set a strong compliance tone at the top of the banking entity's organization and signal to its employees that management is serious about compliance, which should foster a strong culture of compliance throughout the banking entity. Similarly, the proposed independent testing requirement would provide a third-party assessment of a banking entity's compliance with the proposed rule, which should provide assurances to the banking entity, its clients, customers, and counterparties, and current or prospective investors that the banking entity is in compliance with the proposed rule. In addition, the proposed training requirement should help the various employees of a banking entity that have responsibilities and obligations under the proposed rule (e.g., complying with the requirements for permitted market making-related activity) understand such responsibilities and obligations and facilitate the banking entity's compliance with the proposed rule. This proposed requirement may also promote market confidence by assuring that trading personnel, and other appropriate personnel of the banking entity, are familiar with their regulatory responsibilities and are complying with the applicable laws and regulations in their interactions with clients, customers, and counterparties.

Because the six elements would be required to be established by all banking entities, other than those that are not engaged in covered trading activities or covered fund activities or investments, the proposed compliance program requirement should promote consistency across banking entities. However, the proposed elements are also intended to give a banking entity a degree of flexibility in establishing and maintaining its compliance program in order to address the varying nature of activities or investments conducted by different units of the banking entity's organization, including the size, scope, complexity, and risks of the activity or investment.

We seek comment on whether developing and providing for the continued administration of a compliance program under § __.20 of the proposed rule is likely to impose material costs on banking entities. Costs related to the proposed compliance program requirement are likely to be higher for those banking entities that are engaged in significant covered trading or covered fund activities or investments and, as a result, are required to comply with the more detailed, specific requirements of proposed Appendix C. Potential costs related to implementation of a compliance program under the proposal include those associated with: Hiring additional personnel or other personnel modifications, new or additional systems (including computer hardware or software), developing exception reports, and consultation with outside experts (e.g., attorneys, accountants). The proposed compliance program requirement would also impose ongoing costs related to maintenance and enforcement of the compliance program

[365] Proposed rule § __.20 and Appendix C implement section 13(e) of the BHC Act, which requires the Agencies to issue regulations regarding internal controls and recordkeeping to ensure compliance with section 13.

elements, which may include those associated with: Ongoing system maintenance, surveillance (e.g., reviewing and monitoring exception reports), recordkeeping, independent testing, and training. For example, the independent testing requirement in the proposal may necessitate that additional resources be provided to the internal audit department of the covered banking entity that is a registered broker-dealer or security-based swap dealer, if such testing is conducted by a qualified internal tester. Alternatively, if an outside party is used to conduct the independent testing, the covered banking entity would incur costs associated with paying the qualified outside party's for its services. The Agencies do not anticipate significant costs related to the proposed management framework requirement, as banking entities should already have relevant management structures in place.

The tiered approach with which the proposal applies the proposed compliance program requirement to banking entities of varying size should reduce the costs associated with developing and providing for the continued administration of a compliance program. In setting forth the proposed compliance program requirement in § __.20 of the proposed rule and Appendix C, the Agencies have taken into consideration the size, scope, and complexity of a banking entity's covered trading activities and covered fund activities and investments in developing requirements targeted to the compliance risks of large and small banking entities. Specifically, banking entities that do not meet the thresholds established in § __.20(c) of the proposed rule would not be required to comply with the more detailed and burdensome requirements set forth in Appendix C. In addition, banking entities that do not engage in covered trading activities and covered fund activities and investments would not be required to establish a compliance program under the proposed rule, and therefore should incur only minimal costs associated with adding measures to their existing compliance policies and procedures to prevent the banking entity from becoming engaged in such activities or making such investments. Together, these provisions have been proposed in order to permit a banking entity to tailor its compliance program to its activities and investments and, where possible, leverage its existing compliance structures, all of which should minimize the incremental costs associated with establishing a compliance program under the proposed rule. However, banking entities that are engaged in significant covered trading and covered fund activities and investments and thereby present a heightened compliance risk due to the size and nature of their activities and investments would be required to comply with the additional standards set forth in proposed Appendix C.

Costs associated with the requirements of proposed Appendix C should also be reduced by aspects of the proposed rule that would permit a banking entity to establish an enterprise-wide compliance program under certain circumstances. An enterprise-wide compliance program would generally permit one compliance program to be established for a banking entity and all of its affiliates and subsidiaries collectively, rather than each legal entity being required to establish its own separate compliance program. The Agencies expect that an enterprise-wide compliance program should promote efficiencies and economies of scale, and reduce costs, associated with establishing separate compliance programs.

E. Additional Request for Comment

In addition to the requests for comment discussed above, we seek commenters' views on the following additional questions related to the potential economic impacts of the proposed framework for implementing section 13 of the BHC Act:

Question 348. What are the expected costs and benefits of complying with the requirements of the proposed rule? We seek commenters' estimates of the aggregate cost or benefit that would be incurred or received by banking entities subject to section 13 of the BHC Act to comply. We also ask commenters to break out the costs or benefits of compliance to banking entities with each individual aspect of the proposed rule. Please provide an explanation of how cost or benefit estimates were derived. Please also identify any costs or benefits that would occur on a one time basis and costs that would recur. Would particular costs or benefits decrease or increase over time? If certain costs or benefits cannot be estimated, please discuss why such costs or benefits cannot be estimated.

Question 349. Please identify any costs or benefits that would occur on a one-time basis and costs or benefits that would recur (e.g., training and compliance monitoring). Please identify any costs or benefits that you believe would decrease over time. Please identify any costs or benefits that you believe may increase over time or remain static.

Question 350. Are there circumstances in which registered dealers, security-based swap dealers, and/or swap dealers (i) hold accounts other than trading accounts or (ii) hold investment positions for activities for which they are required to be registered? If so, would including all such dealer positions within the trading account definition create competitive burdens as well as additional burdens on the operations of such dealers that may not be consistent with the language and purpose of the statute? Please describe how this may occur, and to what extent it may occur.

Question 351. Please identify the ways, if any, that banking entities might alter the ways they currently conduct business as a result of the costs that could be incurred to comply with the requirements of the proposed rule. Do you anticipate that banking entities will terminate any services or products currently offered to clients, customers, or counterparties due to the proposed rule, if adopted? Please explain.

Question 352. How would trading systems and practices used in today's marketplace be impacted by the proposed rule? What would be the costs and/or benefits of such changes in trading practices and systems?

Question 353. Would the proposed rule create any additional implementation or operational costs or benefits associated with systems (including computer hardware and software), surveillance, procedural, recordkeeping, or personnel modifications, beyond those discussed in the above analysis? Would smaller banking entities be disproportionately impacted by any of these additional implementation or operational costs?

Question 354. We seek specific comments on the costs and benefits associated with systems changes on banking entities with respect to the proposed rule, including the type of systems changes necessary and quantification of costs associated with changing the systems, including both start-up and maintenance costs. We request comments on the types of jobs and staff that would be affected by systems modifications and training with respect to the proposed rule, the number of labor hours that would be required to accomplish these matters, and the compensation rates of these staff members.

Question 355. Please discuss any human resources costs associated with the proposed rule, along with any associated overhead costs.

Question 356. What are the benefits and costs associated with the requirements for relying on the underwriting exemption? What impact will these requirements have on capital formation, efficiency, competition, liquidity, price efficiency, if any? Please estimate any resulting benefits and costs or discuss why such benefits and costs cannot be estimated. What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 357. What are the benefits and costs associated with the requirements for relying on the exemption for market making-related activity, including the requirement that such activity be consistent with the commentary in Appendix B? What impact will these requirements have on liquidity, price efficiency, capital formation, efficiency, and competition, if any? Please estimate any resulting benefits and costs or discuss why such benefits and costs cannot be estimated. What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 358. What are the benefits and costs associated with the requirements for relying on the exemption for risk-mitigating hedging activity, including the requirement that certain hedge transactions be documented? What impact will these requirements have on liquidity, price efficiency, capital formation, efficiency, and competition, if any? Please estimate any resulting benefits and costs or discuss why such benefits and costs cannot be estimated. What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 359. Are there traditional risk management activities of banking entities that are not covered by the liquidity management and risk-mitigating hedging exemptions as currently proposed? What risks do banking entities face that go beyond market, counterparty/credit, currency/foreign exchange, interest rate, and basis risk? Could the proposed construction of the liquidity management and risk-mitigating hedging exemptions increase the costs of management or impede the ability of banking entities to effectively manage risk?

Question 360. To rely on the exemptions from the proposed rule for permitted underwriting, market making-related activity, and risk-mitigating hedging, banking entities must establish, maintain, and enforce a compliance program, including written policies and procedures and internal controls. Please discuss how the costs incurred, or benefits received, by banking entities related to initial implementation and ongoing maintenance of the compliance program would impact their customers and their businesses with respect to underwriting, market making, and hedging activity.

Question 361. Please discuss benefits and costs related to the limitations on permitted activities for material conflicts of interest, high-risk assets and trading strategies, and threats to the safety and soundness of banking entities or to the financial stability of the U.S. in the proposed rule. Are there particular benefits and costs related to the proposed definitions of material conflict of interest, high-risk asset, and high-risk trading strategy in the proposed rule? Would these definitions have any unintended costs, such as creating undue burdens and limitations on permitted underwriting, market making-related, or hedging activity? Please explain. What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 362. Please discuss the benefits and costs related to the definition of derivative in the proposed rule and the application of the restrictions on proprietary trading to transactions in the different types of derivatives covered by the definition. What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 363. What costs and benefits would be associated with calculating, reviewing, and analyzing the proposed quantitative measurements? What costs and benefits would be associated with reporting the proposed quantitative measurements to an Agency? Please identify any of the proposed quantitative measurements that are already reported to an Agency and discuss whether the current reporting regime would mitigate costs associated with the proposed rule. With respect to any quantitative measurement that is not already reported to an Agency, what are the costs and benefits of beginning to report the measurement? Would banking entities have to create or purchase new systems or implement changes to existing systems in order to report these quantitative measurements? Please discuss the costs and benefits associated with such systems changes.

Question 364. How much of the data necessary to calculate the quantitative measurements in Appendix A is currently captured, retained, and utilized by banking entities? If the applicable data is not currently used by banking entities, is it readily available? Is it possible to collect all of the data that is necessary for calculating the required measurements? Please identify any data that banking entities do not currently utilize that would need to be captured and retained for purposes of proposed Appendix A and discuss the costs and benefits of capturing and retaining such data.

Question 365. Do the costs and benefits of calculating, analyzing, and reporting certain or all quantitative measurements differ between trading units and their trading activities, including trading strategies, asset classes, market structure, experience and market share, and market competitiveness? Are any quantitative measurements particularly costly to calculate or analyze for specific trading activities or, alternatively, particularly beneficial? If so, which quantitative measurement, what type of trading activity, and what factor(s) of that trading activity makes the quantitative measurement particularly costly or beneficial? Please discuss how these costs, if any, could be mitigated or benefits, if any, could be enhanced.

Question 366. The proposed definition of trading unit would require a tiered approach to calculating and reporting quantitative measurements, such that the measurements would be calculated and reported for different levels within the banking entity, with higher levels encompassing smaller units (e.g., trading desks, business lines, and all trading operations). What are the costs and benefits of calculating the quantitative measurements for each level within the definition of trading unit? Can the higher level calculations incorporate the lower level calculations such that the higher level calculations result in small, incremental costs? Why or why not? Are there particular costs or benefits associated with calculating, analyzing, and reporting a quantitative measurement at one of the levels within the definition of trading unit that would not be experienced at the other levels? Please explain. What are the costs, if any, of ''noise,'' ''false positives,'' or ''false negatives'' with respect to the quantitative measurements and calculations at different levels? Can these costs be mitigated and, if so, how? What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 367. We seek comment on whether the requirement that banking entities employ a suite of quantitative measurements may lead to redundancies and/or inefficiencies in the application of the measurements for

some types of trading units within some banking entities. Despite the flexibility of Appendix A via recognition that quantitative measurements will be applied with respect to differences within a banking entity's structure, business lines, and trading desks, we seek comment on whether the requirement of a mandatory suite of quantitative measurements may prove burdensome. For instance, is the application of certain quantitative measurements not efficient, appropriate, or calculable for certain asset classes or trading units or would the benefits of applying such quantitative measurements be negligible in relation to the costs of applying such measurements? In addition, would the overlay divert a banking entity from allocating resources toward quantitative—or other—measurements that might prove more useful and better tailored to its specific and unique trading practices?

Question 368. What are the benefits and costs of the recordkeeping requirement in proposed Appendix A? Please explain and quantify, to the extent possible. To what extent would the proposed recordkeeping requirement impose new or additional costs and benefits beyond the current recordkeeping obligations of different types of banking entities (e.g., affiliated broker-dealers, affiliated investment advisers, insured depository institutions, etc.)? What alternatives, if any, may be more cost-effective while still being consistent with the purpose and language of the statute?

Question 369. Please identify any cost savings that would be achieved through the use of an enterprise-wide compliance program. Alternatively, would you expect certain costs to increase when using an enterprise-wide compliance program? Please explain. Please identify any benefits that might be amplified or reduced when using an enterprise-wide compliance program.

Question 370. Are there tools or elements in the contents of the compliance program set forth in § __.20(b) for which the costs may be negligible because banking entities use the same or similar elements for other purposes (e.g., satisfying other regulatory requirements, risk management, etc.) and could utilize existing infrastructure for purposes of the proposed rule? For example, could existing trader mandates or an existing training program be expanded to meet the requirements of the proposed rule, rather than developing an entirely new infrastructure? Alternatively, would the proposed rule require redundancies or duplications within a banking entity's infrastructure (e.g., the trader mandates currently used for one purpose do not conform to the requirements of the proposed rule, so a banking entity would have to utilize both in different circumstances)? Please identify and explain any such redundancies and how the rule could be modified to reduce or eliminate such redundancies, if possible.

Question 371. How would the proposed rule affect compliance costs (e.g., personnel or system changes) or benefits for each category of banking entity: Small, medium, and large? Please discuss any differences between the costs and benefits of the compliance program required under § __.20(b) for smaller banking entities and the compliance program requirements of Appendix C for larger banking entities. Are the differences between these benefits and costs justified due to the differences in size and complexity of smaller and larger banking entities?

Question 372. The definition of trading unit in proposed Appendix C covers different levels of a banking entity and, as a result, requires a tiered approach to establishing, maintaining, and enforcing the compliance program requirements with respect to covered trading activities. What are the costs and benefits of applying the compliance program requirements at several levels within the banking entity? To what extent does the ability to incorporate written policies and procedures of lower-level units by reference, rather than establishing separate written policies and procedures, mitigate the costs of the proposed requirements? Are there other ways that the proposed requirements could be made more cost-effective for the different levels within the banking entity?

Question 373. How will the proposed definition of ''covered fund'' affect a banking entity's investment advisory activities, in particular activities and relationships with investment funds that would be treated as ''covered funds''? Please estimate any resulting costs or benefits or discuss why such costs or benefits cannot be estimated.

Question 374. How have banking entities traditionally organized and offered covered funds? What are the benefits and costs associated with the proposed requirements for relying on the exception for organizing and offering covered funds? Please estimate any resulting costs or benefits or discuss why such costs or benefits cannot be estimated.

Question 375. What are the costs and benefits associated with the way the proposed rule implements the ''customers of such services'' requirement in the exception for organizing and offering covered funds? What alternative, if any, may be more cost-effective while still being consistent with the language and purpose of the statute?

Question 376. Is it common for a banking entity to share a name with the covered funds that it invests in or sponsors? If yes, what entity in the banking structure typically shares a name with such covered funds? What costs and benefits will result from the proposed rule's implementation of the name sharing requirement in exception for organizing and offering a covered fund? What alternatives, if any, may be more cost-effective while still being consistent with the purpose of the statute?

Question 377. Under what circumstances do directors and employees of a banking entity invest in covered funds? What are the benefits and costs associated with the proposed provisions regarding director and employee investments in covered funds? What alternatives, if any, may be more cost-effective while still being consistent with the purpose of the statute?

Question 378. Do banking entities currently invest in or sponsor SBICs and public welfare and qualified rehabilitation investments? If yes, to what extent? What are the benefits and costs associated with the proposed rule's implementation of the exception for investment in SBICs and public welfare and qualified rehabilitation investments?

Question 379. Do banking entities currently invest in or sponsor each of the vehicles that the proposed rule permits banking entities to continue to invest in and sponsor under section 12(d)(1)(J) of the BHC Act? If yes, to what extent? What are the benefits and costs associated with the proposed rule's implementation of these exceptions?

Question 380. For banking entities that are affiliated investment advisers, are there additional costs or benefits to complying with section 13 of the BHC Act and the proposed rule? For example, do affiliated investment advisers typically maintain records that would enable them to demonstrate compliance with the 3% ownership limits or restrictions on transactions that would be subject to sections 23A and 23B of the FR Act?

Question 381. Would complying with section 13 of the BHC Act and the proposed rule affect an affiliated investment adviser's other business activities (benefit or burden) that are not subject to restrictions on proprietary

trading or other covered fund activities? For example, would advisers incur additional burdens to distinguish covered fund activities from non-covered fund activities?

Question 382. For banking entities that are affiliated investment advisers, are there particular costs or benefits to complying with the portions of Appendix C that are applicable to each asset management unit of the adviser? Do these costs and benefits differ depending on whether the adviser complies with Appendix C individually or on an enterprise basis? Does the rule provide sufficient clarify for how Appendix C applies to unregistered affiliates of an affiliated investment adviser?

Question 383. To the extent applicable, please address each of the questions above with respect to securitization vehicles that would be included in the proposed definition of covered fund.

VII. Administrative Law Matters

A. Paperwork Reduction Act Analysis Request for Comment on Proposed Information Collection

In accordance with section 3512 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (''PRA''), the Agencies may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (''OMB'') control number. The OCC, FDIC, and Board will obtain OMB control numbers. The information collection requirements contained in this joint notice of proposed rulemaking, to the extent they apply to insured financial institutions that are not under a holding company, have been submitted by the OCC and FDIC to OMB for review and approval under section 3506 of the PRA and section 1320.11 of OMB's implementing regulations (5 CFR 1320). The Board reviewed the proposed rule under the authority delegated to the Board by OMB. The Board will submit to OMB once the final rule is published and the submission will include burden for Federal Reserve-supervised institutions, as well as burden for OCC-, FDIC-, SEC-, and CFTC-supervised institutions under a holding company. The OCC and the FDIC will take burden for banking entities that are not under a holding company. The CFTC has stated that it will be publishing a separate proposed rulemaking in the near future. The burden estimates for CFTC-supervised institutions, published in this proposed rule, are based on the requirements set forth below and the assumption that the CFTC's proposed rulemaking would contain substantively similar requirements.

The proposed rule contains requirements subject to the PRA. The reporting requirements are found in sections __.7(a) and __.12(d); the recordkeeping requirements are found in sections __.3(b)(2)(iii)(C), __.5(c), __.7(a), __.11(b), __.13(b)(3), __.20(b), __.20(c), and __.20(d); and the disclosure requirement is found in section __.11(h)(1). The recordkeeping and disclosure burden for the following sections is accounted for in the __.20(b) burden: __.4(a)(2)(i), __.4(b)(2)(i), __.5(b)(1), __.5(b)(2)(i), __.5(b)(2)(v), __.13(b)(2)(i), __.13(b)(2)(ii)(A), __.13(b)(2)(ii)(D), __.15(a)(1), and __.17(b)(1). These information collection requirements would implement section 619 of the Dodd-Frank Act, as mentioned in the Abstract below. The respondent/recordkeepers are for-profit financial institutions, including small businesses. A covered entity must retain these records for a period that is no less than 5 years in a form that allows it to promptly produce such records to [Agency] on request.

Comments are invited on:

(a) Whether the collections of information are necessary for the proper performance of the Agencies' functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the **ADDRESSES** section of this Supplementary Information. A copy of the comments may also be submitted to the OMB desk officer for the Agencies: By mail to U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503 or by facsimile to (202) 395–5806, Attention, Commission and Federal Banking Agency Desk Officer.

Proposed Information Collection

Title of Information Collection: Reporting, Recordkeeping, and Disclosure Requirements Associated with Restrictions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds.

Frequency of Response: Annual, monthly, and on occasion.

Affected Public: Businesses or other for-profit.

Respondents

Board: State member banks, bank holding companies, savings and loan holding companies, mutual holding companies, foreign banking organizations, and other holding companies that control an insured depository institution. The Board will take burden for all institutions under a holding company including:

- OCC-supervised institutions,
- FDIC-supervised institutions,
- Banking entities for which the CFTC is the primary financial regulatory agency, as defined in section 2(12)(C) of the Dodd-Frank Act, and
- Banking entities for which the SEC is the primary financial regulatory agency, as defined in section 2(12)(B) of the Dodd-Frank Act.

OCC: National banks, federal savings associations, and federal savings banks not under a holding company, and their respective subsidiaries, and their affiliates not under a holding company. The OCC will take the burden with respect to registered investment advisers and commodity trading advisers and commodity pool operators that are subsidiaries of national banks, federal savings associations, and federal savings banks not under a bank holding company.

FDIC: State nonmember banks not under a holding company; state savings associations and state savings banks not under a holding company; subsidiaries of state nonmember banks, state savings associations and state savings banks not under a holding company; and foreign banks having an insured branch.

Abstract: Section 619 of the Dodd-Frank Act added a new section 13 to the BHC Act (to be codified at 12 U.S.C. 1851) that generally prohibits any banking entity from engaging in proprietary trading or from investing in, sponsoring, or having certain relationships with a hedge fund or private equity fund, subject to certain exemptions. New section 13 of the BHC Act also provides for nonbank financial companies supervised by the Board that engage in such activities or have such

investments or relationships to be subject to additional capital requirements, quantitative limits, or other restrictions.

Section __.3(b)(2)(iii)(C) would require a covered banking entity to establish a documented liquidity management plan in order to rely on an exclusion from the definition of ''trading account'' for certain positions taken for the bona fide purpose of liquidity management.

Section __.5(c) would require that, with respect to any purchase, sale, or series of purchases or sales conducted by a covered banking entity pursuant to section __.5 for risk-mitigating hedging purposes that is established at a level of organization that is different than the level of organization establishing the positions, contracts, or other holdings the risks of which the purchase, sale, or series of purchases or sales are designed to reduce, the covered banking entity document, at the time the purchase, sale, or series of purchases or sales are conducted:

(1) The risk-mitigating purpose of the purchase, sale, or series of purchases or sales;

(2) The risks of the individual or aggregated positions, contracts, or other holdings of a covered banking entity that the purchase, sale, or series of purchases or sales are designed to reduce; and

(3) The level of organization that is establishing the hedge.

Section __.7(a) would require a covered banking entity engaged in any proprietary trading activity pursuant to sections __.4 through __.6 to comply with the reporting and recordkeeping requirements described in Appendix A if the covered banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion, as well as such other reporting and recordkeeping requirements as a relevant Agency may impose to evaluate the covered banking entity's compliance with this subpart.

Section __.11(b) would require that, with respect to any covered fund that is organized and offered by a covered banking entity in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and to persons that are customers of such services of the covered banking entity, the covered banking entity document how the covered banking entity intends to provide advisory or similar services to its customers through organizing and offering such fund.

Section __.11(h)(1) would require that, with respect to any covered fund that is organized and offered by a covered banking entity in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and to persons that are customers of such services of the covered banking entity, the covered banking entity clearly and conspicuously disclose, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents):

(1) That ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the covered banking entity and its affiliates or subsidiaries]; therefore, [the covered banking entity's and its affiliates' or subsidiaries'] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by the [covered banking entity and its affiliates or subsidiaries] in their capacity as investors in the [covered fund]'';

(2) That such investor should read the fund offering documents before investing in the covered fund;

(3) That the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case); and

(4) The role of the covered banking entity and its affiliates, subsidiaries and employees in sponsoring or providing any services to the covered fund.

Section __.12(d) would extend the time to divest an ownership interest in a covered fund. Upon receipt of an application from a covered banking entity, the Board may extend the period of time to meet the requirements under paragraphs (a)(2)(i)(A) and (B) of that section for up to 2 additional years, if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest. An application for extension must:

(1) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(2) Provide the reasons for application, including information that addresses the factors in paragraph (e)(2) of that section; and

(3) Explain the covered banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2)(i) of that section.

Section __.13(b)(3) would require that, with respect to any acquisition or retention of an ownership interest in a covered fund by a covered banking entity pursuant to § __.13(b), the covered banking entity must document, at the time the transaction is conducted:

(1) The risk-mitigating purpose of the acquisition or retention of an ownership interest in a covered fund;

(2) The risks of the individual or aggregated obligation or liability of a covered banking entity that the acquisition or retention of an ownership interest in a covered fund is designed to reduce; and

(3) The level of organization that is establishing the hedge.

Section __.20(b) would require a compliance program with respect to covered fund activities and investments that shall, at a minimum, include:

(1) Internal written policies and procedures reasonably designed to document, describe, and monitor the covered trading and covered fund activities and investments of the covered banking entity to ensure that such activities and investments are compliant with section 13 of the BHC Act and this part;

(2) A system of internal controls reasonably designed to monitor and identify potential areas of noncompliance with section 13 of the BHC Act and this part in the covered banking entity's covered trading and covered fund activities and investments and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and this part;

(3) A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part;

(4) Independent testing for the effectiveness of the compliance program conducted by qualified personnel of the covered banking entity or by a qualified outside party;

(5) Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and

(6) Maintenance of records sufficient to demonstrate compliance with section 13 of the BHC Act and this part, which a covered banking entity must promptly provide to the Agency upon request and retain for a period of no less than 5 years.

Section __.20(c) would require the compliance program of a covered banking entity to also comply with the requirements and other standards contained in Appendix C if the covered banking entity: (i) Engages in proprietary trading and has, together

with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters (A) is equal to or greater than $1 billion, or (B) equals 10 percent or more of its total assets; or (ii) invests in, or has relationships with, a covered fund and (A) the covered banking entity has, together with its affiliates and subsidiaries, aggregate investments in one or more covered funds, the average value of which is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion, or (B) sponsors and advises, together with its affiliates and subsidiaries, one or more covered funds, the average total assets of which are, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion.

Section __.20(d) would require a covered banking entity that does not engage in activities or investments prohibited or restricted in subpart B or subpart C of the proposed rule, in order to be deemed to have satisfied the requirements of § __.20, to ensure that its existing compliance policies and procedures include measures that are designed to prevent the covered banking entity from becoming engaged in such activities or making such investments and which require the covered banking entity to develop and provide for establishment of the compliance program required under § __.20(a) of the proposed rule prior to engaging in such activities or making such investments.

Estimated Paperwork Burden

In determining the method for estimating the paperwork burden the Agencies made the assumption that affiliated entities under a holding company would act in concert with one another to take advantage of efficiencies that may exist. The Agencies invite comment on whether it is reasonable to assume that affiliated entities would act jointly to implement a firm-wide program or whether they would act independently to implement programs tailored to each entity. In addition, the Agencies invite comment as to the accuracy of our estimates of the burdens concerning the proposed collections of information and whether all banking entities subject to the rule are appropriately accounted for by the Agencies.

Estimated Burden Per Response

Section __.3(b)(2)(iii)(C) recordkeeping—1 hour (Initial setup 3 hours).

Section __.5(c) recordkeeping—6 hours for entities with $1 billion or more in trading assets/liabilities, 35 hours for entities with $5 billion or more in trading assets/liabilities.

Section __.7(a) reporting—2 hours for entities with $1 billion or more in trading assets/liabilities, 2 hours for entities with $5 billion or more in trading assets/liabilities (Initial setup 6 hours for entities with $1 billion or more in trading assets/liabilities, 6 hours for entities with $5 billion or more in trading assets/liabilities).

Section __.7(a) recordkeeping—350 hours for entities with $1 billion or more in trading assets/liabilities, 440 hours for entities with $5 billion or more in trading assets/liabilities.

Section __.11(b) recordkeeping—10 hours.

Section __.11(h)(1) disclosure—0.10 hours.

Section __.12(d) reporting—20 hours (Initial setup 50 hours).

Section __.13(b)(3) recordkeeping—10 hours.

Section __.20(b) recordkeeping—265 hours (Initial setup 795 hours).[366]

Section __.20(c) recordkeeping—1,200 hours (Initial setup 3,600 hours).

Section __.20(d) recordkeeping—8 hours.

Board

Number of respondents: 10,000.
Total estimated annual burden: 6,283,620 hours (4,541,070 hours for initial setup and 1,742,550 hours for ongoing compliance).

FDIC

Number of respondents: 1,139.
Total estimated annual burden: 46,428 hours (29,934 hours for initial setup and 16,494 hours for ongoing compliance).

OCC

Number of respondents: 469.
Total estimated annual burden: 253,796 hours (187,643 hours for initial setup and 66,153 hours for ongoing compliance).

B. Initial Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.,* requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities.[367] If so, the agency must prepare an initial and final regulatory flexibility analysis respecting the significant economic impact. Pursuant to section 605(b) of the RFA, the regulatory flexibility analysis otherwise required under sections 603 and 604 of the RFA is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Agencies have considered the potential impact of the proposed rule on small entities in accordance with the RFA. The proposed rule would not appear to have a significant economic impact on small entities for several reasons.

First, while the proposed rule will affect all banking organizations, including those that have been defined to be ''small businesses'' under the RFA, only certain limited requirements would be imposed on entities that engage in little or no covered trading activities or covered fund activities and investments. Significantly, the reporting and recordkeeping requirements of § __.7 and Appendix A of the proposed rule apply only to banking entities with average trading assets and liabilities on a consolidated, worldwide basis equal to or greater than $1 billion for the preceding year. This is a threshold that a small banking entity typically would not meet.

Second, the scope and size of the compliance program requirements set forth in subpart D and Appendix C of the proposed rule would vary based on the size and activities of each covered banking entity. Only banking entities with average trading assets and liabilities on a worldwide consolidated basis equal to or greater than $1 billion or 10 percent or more of their total assets, or that have aggregate investments in, or sponsor or advise, covered funds with aggregate total assets of more than $1 billion must establish, maintain and enforce a full compliance program under the proposed rule. Banking entities that engage in trading activities or covered fund activities and investments under these thresholds must adopt, at a minimum, only the six core compliance requirements set forth in § __.20 of the proposed rule. Banking entities that do not engage in any covered trading or fund activities, typical of small banking entities, must ensure only that their compliance programs include measures designed to

[366] For the Board, the section __.20(b) burden hours are 266 hours (ongoing) and 796 hours (initial setup) because the Board is accounting for the 1 hour disclosure burden for certain SEC- and CFTC-supervised entities.

[367] A banking organization is generally considered to be a small banking entity for the purposes of the RFA if it has assets less than or equal to $175 million. *See also* 13 CFR 121.1302(a)(6) (noting factors that the Small Business Administration considers in determining whether an entity qualifies as a small business, including receipts, employees, and other measures of its domestic and foreign affiliates).

prevent the entities from becoming engaged in covered activities unless they first adopt a compliance program. These compliance requirements would not appear to have a significant economic impact on a substantial number of small entities.

OCC, FDIC, and SEC: For the reasons stated above, the head of the OCC, FDIC, and the SEC certifies, for the covered banking entities subject to each such Agency's jurisdiction, that the proposed rule would not result in a significant economic impact on a substantial number of small entities. The OCC, FDIC, and SEC encourage written comments regarding this certification, and request that commenters describe the nature of any impact on small entities and provide empirical data to illustrate and support the extent of the impact.

Board: For the reasons stated above, the proposed rules would not appear to have a significant economic impact on small entities subject to the Board's jurisdiction. The Board welcomes written comments regarding this initial regulatory flexibility analysis, and requests that commenters describe the nature of any impact on small entities and provide empirical data to illustrate and support the extent of the impact. A final regulatory flexibility analysis will be conducted after consideration of comment received during the public comment period.

C. OCC Unfunded Mandates Reform Act of 1995 Determination

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (''Unfunded Mandates Act''), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more, as adjusted by inflation, in any one year. If a budgetary impact statement is required, Section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OCC has completed an assessment whether any mandates imposed by the proposed rule may result in expenditures of $100 million or more annually, as adjusted by inflation, by state, local, and tribal governments, or by the private sector as required by the Unfunded Mandates Act. The OCC focused its analysis on the impact of the various compliance, recordkeeping, reporting, disclosure, and training requirements in the proposed rule and, as provided for under section 201 of the Unfunded Mandates Act (2 U.S.C. 1531), excluded the cost of requirements specifically set forth in the statute. Overall, the OCC determined that this proposed rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, this proposal is not subject to Section 202 of the Unfunded Mandates Act.

The OCC also will need to prepare an impact statement for the final rule, for purposes of the Unfunded Mandates Act and the Congressional Review Act, Public Law 104–121 (5 U.S.C. 801–808). Comments provided on the costs and benefits of the proposed rule, in response to the analysis and questions posed in the Supplemental Information Part VII.D, will help to inform this assessment.

D. SEC: Small Business Regulatory Enforcement Fairness Act

Under the Small Business Regulatory Enforcement Fairness Act of 1996,[368] a rule is ''major'' if it has resulted, or is likely to result, in:

- An annual effect on the U.S. economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

The SEC requests comment on whether its proposed rule would be a ''major'' rule for purposes of the Small Business Regulatory Enforcement Fairness Act. In addition, the SEC solicits comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumer or individual industries; and
- Any potential effect on competition, investment, or innovation.

VIII. SEC: Additional Matters

A. Statutory Authority and ''Covered Banking Entity'' Definition

1. Statutory authority

Section __.1 of the proposed rule implementing section 13 of the BHC Act cites section 13 of the BHC Act, pursuant to which the SEC is adopting the entirety of the proposed rule with respect to ''covered banking entities,'' as that term is defined in the SEC's proposed rule.[369] Section __.1 also cites the SEC's independent authority under certain sections of the Exchange Act to adopt §§ __.5(c), __.7(a), __.20, and Appendices A and C of the proposed rule.[370] Compliance with such provisions, if adopted, will be subject to examination and enforcement under the Exchange Act for certain covered banking entities.

2. ''Covered Banking Entity'' Definition

The proprietary trading and covered fund activity prohibition set forth in section 13 of the BHC Act, as proposed to be implemented in § __.3(a) and § __.10(a) of the proposed rule, would apply to any ''covered banking entity.''[371] The term ''banking entity'' is generally defined under section 13 of the BHC Act to include any insured depository institution, any company that controls an insured depository institution, any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978, and any affiliates and subsidiaries of these entities.[372] Section __.2(j) of the proposed rule implementing section 13 of BHC Act would define the term ''covered banking entity.'' This term is used in each Agency's proposed rule to describe the specific types of banking entities to which that Agency's rule would apply.

As discussed in Part I of the Supplementary Information, the authority for adopting regulations to implement section 13 of the BHC Act is divided between the Agencies in the manner provided in section 13(b)(2).[373]

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[368] Public Law 104–121, Title II, 110 Stat. 857 (1996).

[369] The SEC notes that the SEC is only proposing rules as they would be applicable to the banking entities for which the SEC has regulatory authority, as set forth in section 13(b)(2)(B)(IV) of the BHC Act, *e.g.,* registered broker-dealers. Accordingly, the SEC proposal should be read in the context of these regulated entities and comments to the SEC should focus on these entities. For instance, the SEC is particularly interested in the impact of the proposed rules on the activities of such entities.

[370] 15 U.S.C. 78*o*(c)(3)(A), 78*o*–10(f), (j), 78q(a), 78w.

[371] Proposed rule § __.3(a) provides ''Except as otherwise provided in this subpart, a covered banking entity may not engage in proprietary trading.'' Proposed rule § __.10(a) provides ''Except as otherwise provided in this subpart, a covered banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.''

[372] *See* 12 U.S.C. 1851(h)(1); proposed rule § __.2(e).

[373] *See* 12 U.S.C. 1851(b)(2). Under section 13(b)(2)(B) of the BHC Act, rules implementing section 13's prohibitions and restrictions must be issued by: (i) The appropriate Federal banking agencies (i.e., the Board, the OCC, and the FDIC), jointly, with respect to insured depository institutions; (ii) the Board, with respect to any company that controls an insured depository institution, or that is treated as a bank holding company for purposes of section 8 of the International Banking Act, any nonbank financial company supervised by the Board, and any subsidiary of any of the foregoing (other than a

Continued

Section 13 of the BHC Act generally prohibits a banking entity from engaging in proprietary trading or investing in or sponsoring a hedge fund or private equity fund, and section 13(b)(2)(B)(i)(IV) of the BHC Act directs the SEC to issue rules implementing that section with respect to any entity for which the SEC is the primary financial regulatory agency, as that term is defined in section 2 of the Dodd-Frank Act.[374] The SEC has proposed to restate that statutory provision in defining ''covered banking entity'' for purposes of the SEC's proposed rule.[375]

The SEC recognizes that some entities that would be included in the SEC's proposed definition of ''covered banking entity'' generally do not engage in covered trading activities and covered fund activities and investments. The SEC notes that, to the extent the covered banking entity does not engage in activities and investments covered by section 13 of the BHC Act and the proposed rule, the proposal is reasonably designed to reduce and alleviate any burdens on such a covered banking entity, while also preventing evasion of the proposed rule. Specifically, a covered banking entity that does not engage in activities and investments prohibited or restricted by section 13 of the BHC Act and the proposed rule would only be required to include measures in its existing compliance policies and procedures that are reasonably designed to prevent the covered banking entity from becoming engaged in such activities and making such investments under the proposed rule.[376]

The SEC requests comment on the proposed definition of ''covered banking entity.'' In particular, the SEC requests comment on the following questions:

Question SEC–1. Is the SEC's proposed definition of the term ''covered banking entity'' sufficiently clear? If not, why not? Please suggest an alternative definition.

Question SEC–2. Is the SEC's proposed definition of the term ''covered banking entity'' appropriate, or is it over- or under-inclusive? Please explain.

Question SEC–3. Should any of the covered banking entities included in the SEC's proposed definition of ''covered banking entity'' be excluded? If so, which entities, why, and on what basis? Should the SEC's proposed rule provide specific guidance or exemptions for any such entities?

Question SEC–4. Would particular types of entities incur costs or burdens that are greater than other types of entities that are included in the SEC's proposed definition of ''covered banking entity''? If so, should any such difference be addressed or mitigated? How?

Question SEC–5. Are all of the provisions in the proposed rule relevant to the business conducted by SEC covered banking entities? If not, which provisions are not relevant and how should this be addressed in the rule? Are there differences between the SEC's covered banking entities and other types of banking entities subject to the rules of the Federal banking agencies or the CFTC that have not been sufficiently accounted for in the proposed rule? If so, what are these differences and how should the SEC's rule account for such differences in a manner that is consistent with the statutory requirement that the Agencies' rules be consistent and comparable, to the extent possible?

B. Consideration of the Impact of Reporting and Recordkeeping and Compliance Program Proposed Rules on Competition and on the Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the SEC, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.[377] In addition, section 23(a)(2) of the Exchange Act requires the SEC, when adopting rules under the Exchange Act, to consider the impact such rules would have on competition.[378] Section 23(a)(2) of the Exchange Act also prohibits the SEC from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The SEC's consideration of the factors specified in Exchange Act sections 3(f) and 23(a)(2) is limited to those portions of the proposal that, in addition to being proposed under section 13 of the BHC Act, are also being proposed pursuant to the SEC's authority under the Exchange Act with respect to covered banking entities that are registered broker-dealers and security-based swap dealers. The remaining portions of the joint proposed rule are being proposed exclusively under the authority set forth in Section 13 of the BHC Act, which does not require consideration of the factors specified in Exchange Act sections 3(f) and 23(a)(2).

As discussed above in Part III.B.5 of the Supplementary Information, § __.7(a) of the proposed rule and proposed Appendix A require covered banking entities that meet, together with their affiliates and subsidiaries, the $1 billion gross trading assets and liabilities threshold to: (i) Calculate and report certain quantitative measurements, and (ii) create and retain records related to such quantitative measurements. Further, under § __.7(a) of the proposed rule and proposed Appendix A, a larger number of

subsidiary for which an appropriate Federal banking agency, the SEC, or the CFTC is the primary financial regulatory agency); (iii) the CFTC with respect to any entity for which it is the primary financial regulatory agency, as defined in section 2 of the Dodd-Frank Act; and (iv) the SEC with respect to any entity for which it is the primary financial regulatory agency, as defined in section 2 of the Dodd-Frank Act. *See id.*

[374] Under section 2(12)(B) of the Dodd-Frank Act, the term ''primary financial regulatory agency'' means the SEC with respect to (i) SEC-registered brokers and dealers, with respect to the activities of the broker or dealer that require the broker or dealer to be registered as such under the Exchange Act; (ii) SEC-registered investment companies, with respect to the activities of the investment company that require the investment company to be registered under the Investment Company Act; (iii) SEC-registered investment advisers, with respect to the investment advisory activities of such company and activities that are incidental to such advisory activities; (iv) SEC-registered clearing agencies, with respect to the activities of the clearing agency that require the agency to be registered under the Exchange Act; (v) SEC-registered nationally recognized statistical rating organizations; (vi) SEC-registered transfer agents; (vii) national securities exchanges registered with the SEC; (viii) national securities associations registered with the SEC; (ix) SEC-registered securities information processors; (x) the Municipal Securities Rulemaking Board; (xi) the Public Company Accounting Oversight Board; (xii) the Securities Investor Protection Corporation; and (xiii) SEC-registered security-based swap execution facilities, security-based swap data repositories, security-based swap dealers, and major security-based swap participants, with respect to the security-based swap activities of the person that require such person to be registered under the Exchange Act. *See* section 2(12)(B) of the Dodd-Frank Act. The SEC notes that, with respect to SEC-registered clearing agencies, to the extent a clearing agency acquires or takes a position in one or more covered financial positions in connection with clearing securities transactions, such positions would be excluded from the definition of trading account under the proposal. *See* proposed rule § __.3(b)(2)(iii)(D). As a result of this proposed exclusion, clearing agencies' positions taken in connection with clearing securities transactions would not involve proprietary trading, as defined under the proposal, and would not be subject to the prohibition on proprietary trading in § __.3(a) of the proposed rule. As discussed further below, the proposal is designed to reduce any burdens on covered banking entities that do not engage in proprietary trading and covered fund activities and investments.

[375] *See* SEC proposed rule § __.2(j).

[376] *See* proposed rule § __.20(d). However, to the extent that the covered banking entity becomes engaged in such activities or investments, it would be required to develop a more detailed compliance program, as set forth in § __.20(b) of the proposed rule.

[377] 15 U.S.C. 78c(f).

[378] 15 U.S.C. 78w(a)(2).

quantitative measurements are required to be calculated and reported by covered banking entities that, together with their affiliates and subsidiaries, have over $5 billion gross trading assets and liabilities. In addition, such measurements are required to be calculated and reported for a broader scope of trading activities if a covered banking entity meets the $5 billion threshold.

The reporting and recordkeeping requirements in § __.7(a) and Appendix A of the proposed rule are likely to impose certain costs on covered banking entities that meet the $1 billion gross trading assets and liabilities threshold, including costs associated with implementing, monitoring, and attributing financial and personnel resources for purposes of complying with the reporting and recordkeeping requirements. Moreover, such costs will likely be greater for covered banking entities that meet the $5 billion threshold. Incurring these costs may marginally reduce the ability of covered banking entities that are registered broker-dealers and security-based swap dealers to compete with their non-banking entity counterparts or with banking entities that do not meet the $1 billion threshold. Further, as a result of these costs, the proposal may impose additional competitive burdens on registered broker-dealers and security-based swap dealers that, together with their affiliates and subsidiaries, meet the $5 billion threshold, and may affect their ability to compete with: (i) Banking entities with $1 to $5 billion gross trading assets and liabilities; (ii) banking entities below the $1 billion threshold; and (iii) non-banking entities. In addition, registered broker-dealers and security-based swap dealers that are covered banking entities meeting the $1 billion threshold may need to redirect resources from other functions of the broker-dealer or security-based swap dealer in order to comply with the reporting and recordkeeping requirements. Reallocating available resources within the registered broker-dealer or security-based swap dealer may reduce efficiency within the covered banking entity and may have a marginal negative impact on the extent to which the registered broker-dealer or security-based swap dealer continues to perform certain functions, which may include those that serve customers or provide other market benefits. If this were to occur, registered broker-dealers and security-based swap dealers that are covered banking entities meeting the $5 billion threshold may face greater efficiency effects because they will likely need to devote more time and resources to the enhanced reporting and recordkeeping requirements set forth in the proposal for such covered banking entities. The increased cost of doing business that may result from the proposed reporting and recordkeeping requirements could also cause a registered broker-dealer or security-based swap dealer that is a covered banking entity to pass some of the costs along to customers and clients of their services, such as market making or underwriting. On the other hand, the reporting and recordkeeping requirements in § __.7(a) and Appendix A could have positive efficiency effects because these measures generally may improve compliance within covered banking entities and thereby reduce the potential consequences associated with noncompliance.

The reporting and recordkeeping requirements may create an incentive for covered banking entities that are registered broker-dealers and security-based swap dealers to reduce their average gross sum of trading assets and liabilities, together with their affiliates and subsidiaries, below the $5 billion threshold or $1 billion in order to avoid the costs of complying with some or all of the requirements in § __.7(a) of the proposed rule and Appendix A. To the extent the proposed rule creates such an incentive, a covered banking entity that is a registered broker-dealer or security-based swap dealer may reduce the amount of its trading activities to be below the applicable threshold. If a registered broker-dealer or security-based swap dealer that is a covered banking entity decreased the extent to which it engaged in trading activities, the resulting effects could be decreased competitiveness of the registered broker-dealer or security-based swap dealer in the broader market and reduced market efficiency and liquidity. Whether there will be a competitive impact will depend on the way in which a registered broker-dealer or security-based swap dealer that is a covered banking entity chooses to reduce its trading activities. For example, if the reporting and recordkeeping requirement lead a covered banking entity to minimize its trading in a particular product, this may lead to a decreased competitiveness in the trading of that particular product. The reporting and recordkeeping requirements, however, could enhance efficiency by improving covered banking entities' compliance and thereby reduce the potential consequences associated with noncompliance.

Further, a majority of the quantitative measurements in proposed Appendix A would only be required to be calculated and reported for trading units engaged in market making-related activity under § __.4(b) of the proposed rule. To the extent that the costs associated with the requirements in Appendix A create a disincentive for covered banking entities that are registered broker-dealers or security-based swap dealers to engage in the full range of market making-related activity that is permitted under the rule, such covered banking entities may reduce the size or scope of their market making activities. If this were to occur to a significant extent, the overall reduction in market making activities would likely have a negative impact on market efficiency and liquidity and, as a related matter, capital formation by causing certain banking entities to provide fewer market making-related services. This potential reduction in market making on the part of certain registered broker-dealers or security-based swap dealers that are covered banking entities may cause some demand for market making-related services to migrate to smaller banking entities not meeting the $1 billion threshold and non-banking entities. At the same time, the quantitative measurements required under Appendix A could have positive efficiency effects by generally improving compliance and thereby reduce the potential consequences associated with noncompliance.

The documentation requirements of § __.5(c) of the proposed rule, which provides that risk-mitigating hedging transactions must be documented in a specified manner if the hedging transaction is established at a level of organization that is different than the level of organization establishing or responsible for the position, contract, or other holding that is being hedged, may have a negative impact on efficiency by reducing the speed with which a covered banking entity could execute a hedge at a different level within the entity. To the extent that the proposed documentation requirement makes it more costly or difficult for a covered banking entity that is a registered broker-dealer or security-based swap dealer to establish hedges at a different level within the entity, this requirement may result in increased risks or reduced profitability of the broker-dealer or security-based swap dealer, which could negatively affect the competitiveness of the broker-dealer or security-based swap dealer. Further, greater difficulties or increased costs, such as those related to potential

systems changes and maintenance, employee resources and time, and recordkeeping, related to establishing a hedge at a different level within the covered banking entity may cause the registered broker-dealer or security-based swap dealer to reduce its underwriting or market making-related activities under the proposed rule in order to avoid costs related to hedging underwriting or market making positions, which could likewise harm efficiency and capital formation. Alternatively, such costs could be passed through to clients or customers of the registered broker-dealer or security-based swap dealer which, in turn, could harm capital formation.

As discussed above in Part III.D of the Supplemental Information, § __.20 of the proposed rule requires all covered banking entities to develop and provide for the continued administration of a program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions of section 13 of the BHC Act and the proposed rule, unless such covered banking entity does not engage in activities or investments prohibited or restricted by subpart B or subpart C of the proposed rule.[379] In addition, covered banking entities that meet the thresholds in § __.20(c) of the proposed rule are required to satisfy the additional standards and requirements in proposed Appendix C with respect to their compliance program.

The SEC recognizes that the compliance program requirements in the proposal are likely to impose certain costs, including implementation and ongoing maintenance costs associated with hiring additional personnel or other personnel modifications, new or additional systems (including computer hardware or software), ongoing system maintenance, developing exception reports, surveillance (e.g., reviewing and monitoring exception reports), consultation with outside experts (e.g., attorneys, accountants), recordkeeping, independent testing, and training. These costs may increase competitive burdens on registered broker-dealers and security-based swap dealers that are covered banking entities. For example, the increased compliance costs related to implementation and ongoing maintenance of the six elements of the compliance program (i.e., written policies and procedures, internal controls, a management framework, independent testing, training, and recordkeeping), as part of the overall cost of doing business, may make it more difficult for covered banking entities that are registered broker-dealers and security-based swap dealers to compete with non-banking entity broker-dealers and security-based swap dealers. Further, there may be additional competitive burdens for covered banking entities that are registered broker-dealers and security-based swap dealers that, together with their affiliates and subsidiaries, meet the thresholds in § __.20(c), which determines the covered banking entities that must comply with the minimum standards in proposed Appendix C, as there are likely to be increased compliance costs related to the more specific requirements for the compliance program requirements set forth in Appendix C. Since the thresholds in § __.20(c) are based on the size of the registered broker-dealer or security-based swap dealer, together with its affiliates and subsidiaries, and the size of their collective covered trading activities and covered fund activities and investments, the demand for these trading activities may migrate to smaller banking entities or non-banking entities.

In addition, the costs associated with implementation and ongoing maintenance of the compliance program requirements in § __.20 of the proposed rule and Appendix C, where applicable, could cause the covered banking entity to redirect resources from other business activities that are generally beneficial to market efficiency, such as market making and other customer-related services. This potential reallocation of resources could have a marginal negative effect on competition, efficiency, and capital formation. For example, the independent testing requirement in the proposal may necessitate that additional resources be provided to the internal audit department of the covered banking entity that is a registered broker-dealer or security-based swap dealer, if such testing is conducted by a qualified internal tester. Alternatively, if an outside party is used to conduct the independent testing, the covered banking entity would incur costs associated with paying the qualified outside party for its services, which would reduce the resources available for other activities of the covered banking entity.

Further, §§ __.4(a), __.4(b), and __.5 of the proposed rule, which permit underwriting, market making-related, and risk-mitigating hedging activities, require a covered banking entity to establish the compliance program required in the proposed rule in order to rely on the exemptions. To the extent that the burdens associated with the compliance program requirements in the proposed rule create an incentive for registered broker-dealers and security-based swap dealers that are covered banking entities to forgo these permitted activities, rather than incur the costs related to establishing and maintaining a compliance program, there would likely be a negative impact on efficiency, competition, and capital formation as a result of reduced market making and underwriting services available to customers and clients of such services.

The SEC requests comment on the competitive or anticompetitive effects of the elements of the proposed rule that are proposed under Exchange Act authority with respect to covered banking entities that are registered broker-dealers and security-based swap dealers. The SEC also seeks comment on the efficiency and capital formation effects of these components of the proposal, if adopted. The SEC encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such effects.

C. Registered Investment Advisers

As discussed above, under the proposed rule, a covered banking entity as defined in § __.2(j) would generally be subject to the substantive requirements contained in the SEC's rule. These substantive requirements implement the provisions on proprietary trading and covered fund activities under section 13 of the BHC Act. Thus for example, a covered banking entity that is a registered dealer would be required to comply with subparts A through D of the SEC's proposed rule, including Appendices A, B and C, where applicable. With respect to covered fund activities, investments or relationships set forth in subpart C and § __.20 of subpart D (''covered fund restrictions''), however, the SEC's proposed rule would require that a covered banking entity that is a covered banking entity because it is an investment adviser for which the SEC is the primary financial regulatory agency under section 2(12)(B)(iii) of the Dodd-Frank Act (a ''registered adviser'') comply with the covered fund restrictions issued by the appropriate Federal banking agency that regulates the banking entity specified in § __.2(e)(1), (2) and (3) with which the registered adviser is affiliated.[380] Under

[379] *See* proposed rule §§ __.20(a), (d).

[380] A registered adviser would, however, be required to comply with the provisions that implement the proprietary trading restrictions set forth in subparts A, B and § __.20 of subpart D of the proposed rule as promulgated by the SEC, including Appendix C, where applicable.

this approach, a registered adviser would be required to comply with the rules and related guidance issued by the appropriate Federal banking agency. The SEC would, however, retain enforcement authority over all activities of registered advisers (i.e., both proprietary trading and covered fund restrictions).

The covered fund restrictions of section 13 of the BHC Act and the proposed implementing rules make reference to or incorporate a number of banking law and supervision concepts that traditionally appear in Federal banking law and are interpreted and applied by the Federal banking agencies. For example, as discussed in greater detail in the Supplementary Information, the limitations on ownership interests in a covered fund set forth in the statute and the proposed rule generally reference the tier 1 capital of the affiliated insured depository institution or the affiliated holding company. Similarly, capital deductions under the proposed rule refer to the tier 1 capital of the affiliated insured depository institution or the affiliated holding company. In addition, the covered fund restrictions of the statute and the proposed rule incorporate by reference sections 23A and 23B of the FR Act and are administered by the Federal banking agencies. These sections of the FR Act restrict and limit transactions between certain banking organizations and their affiliates, some of which are based on a percentage of bank capital. Further, other covered fund restrictions, including for example exemptions for investments involving the public welfare and bank-owned life insurance and the extension of time to divest of investments after the seeding period, reference other banking laws or regulations that are administered by the Federal banking agencies.

In light of these considerations, the SEC's proposed rule would require a registered adviser to comply with the covered fund restrictions contained in subpart C and §.__20 of subpart D of rules implementing section 13 of the BHC that are issued by the appropriate Federal banking agency that regulates the banking entity with which the registered adviser is affiliated. Under the proposed approach, a registered adviser complying with the SEC's rule would do so by complying with the rule issued by the appropriate Federal banking agency, including any related interpretations or guidance regarding such requirements. Similarly, under the proposed approach, the foregoing determinations regarding capital or other banking law requirements that may be applicable to a registered adviser would be made by the appropriate Federal banking agency that regulates the banking entity with which the registered adviser is affiliated. This approach would mitigate the burdens of complying with the covered fund restrictions for registered advisers and would avoid creating incentives for covered fund activities to be moved from a registered adviser to a bank.[381]

The SEC's proposed rule specifies that a registered adviser must comply with the covered fund restrictions contained in subpart C and § __.20 of subpart D that are issued by the appropriate Federal banking agency that regulates the banking entity with which the registered adviser is affiliated. Subpart C, which uses terms defined in subpart A, specifies the covered fund restrictions. Subpart D § __.20 requires the establishment of a compliance program when engaging in covered fund activities. A registered adviser complying with subpart C and § __.20 of subpart D, as issued by the appropriate Federal banking agency, would also rely on interpretative guidance issued by the appropriate Federal banking agency with respect to those subparts of the proposed rule. Because § __.20 of subpart D relates to both the prohibitions and restrictions on proprietary trading activity as well as the prohibitions and restrictions on covered fund activities and investments, a registered adviser would be required to comply with the relevant covered fund provisions issued by the appropriate Federal banking agency. A registered adviser, however, would be subject to the provisions set forth in subpart D of the SEC's proposed rule, including § __.20, that relate to covered trading activities.

Nothing set forth in the discussion above, or in § __.10(a)(2) of the SEC's proposed rule, however, is intended, or shall be deemed, to limit the SEC's authority under any other provision of law, including pursuant to section 13 of the BHC Act.

The SEC request comment on its proposed approach to implementing section 13 of the BHC Act as it applies to registered advisers with respect to the covered fund restrictions. In particular, the SEC requests comment on the following:

Question SEC–5. Should the SEC instead require registered advisers to comply with the covered fund restrictions proposed by the SEC, instead of those issued the appropriate Federal banking agency? If so, could this create incentives to move the advisory business between the registered adviser and its affiliated bank? Are there benefits to this alternate approach? If so, please explain.

Question SEC–6. Are there other alternative approaches to the proposed rule that would be more effective? If yes, what alternatives and why?

Question SEC–7. Would registered advisers affiliated with insured depository institutions benefit from the proposed approach? Why or why not?

Question SEC–8. Would a registered adviser that is affiliated with insured depository institutions that are regulated by multiple Federal banking agencies encounter additional burdens in implementing the proposed approach? With respect to these registered advisers, which Federal banking agency's rules should be applicable to the registered adviser? For example, should the registered adviser be subject to the rules applicable to the registered adviser's immediate parent that is an insured depository institution?

Question SEC–9. Is the proposed requirement that registered advisers comply with the covered fund restrictions in § __.20 issued by the Federal banking agency that regulates the banking entity specified in § __.2(e)(1), (2) and (3) of the proposed rule with which the registered adviser is affiliated sufficiently clear? Are there particular compliance program requirements in § __.20 with respect to the covered fund restrictions that overlap with the proprietary trading restrictions, such that it would be difficult to identify which requirements are related to the covered fund restrictions and which requirements are related to the proprietary trading restrictions? If so, which requirements and how should this overlap be addressed? Should registered advisers be required to comply with § __.20 of the SEC's rule in its entirety? Why or why not?

Question SEC–10. Will the SEC's proposed approach limit the potential for inconsistent application of the proposed rules with respect to affiliates of entities specified in § __.2(e)(1), (2) and (3)? Why or why not?

Question SEC–11. Will the SEC's proposed approach be effective in avoiding the creation of incentives for covered fund activities to move from a

[381] Unless it advises a registered investment company, a bank (as defined in section 202(a)(2) of the Advisers Act) that relies on the exclusion from the definition of investment adviser under section 202(a)(11)(A) of the Advisers Act would not be required to register under the Advisers Act. If such a bank provided advisory services, the bank would not be a ''covered banking entity'' under the SEC's proposed rules because its primary financial regulatory agency would not be the SEC.

registered adviser to a bank? Why or why not?

Text of the Proposed Common Rules

(All Agencies)

The text of the proposed common rules appears below:

PART [ ]—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS

Subpart A—Authority and Definitions

Sec.

Subpart A—Authority and Definitions

§ __.1 Authority, purpose, scope, and relationship to other authorities. [Reserved]

§ __.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the BHC Act (12 U.S.C. 1841(k)).

(b) *Applicable accounting standards* means U.S. generally accepted accounting principles or such other accounting standards applicable to a covered banking entity that [Agency] determines are appropriate, that the covered banking entity uses in the ordinary course of its business in preparing its consolidated financial statements.

(c) *BHC Act* means the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*).

(d) *Bank holding company* has the same meaning as in section 2 of the BHC Act (12 U.S.C. 1841).

(e) *Banking entity* means:

(1) Any insured depository institution;

(2) Any company that controls an insured depository institution;

(3) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(4) Any affiliate or subsidiary of any entity described in paragraphs (e)(1), (2), or (3) of this section, other than an affiliate or subsidiary that is:

(i) A covered fund that is organized, offered and held by a banking entity pursuant to § __.11 and in accordance with the provisions of subpart C of this part, including the provisions governing relationships between a covered fund and a banking entity; or

(ii) An entity that is controlled by a covered fund described in paragraph (e)(4)(i) of this section.

(f) *Board* means the Board of Governors of the Federal Reserve System.

(g) *Buy* and *purchase* each include any contract to buy, purchase, or otherwise acquire. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(h) *CFTC* means the Commodity Futures Trading Commission.

(i) *Commodity Exchange Act* means the Commodity Exchange Act (7 U.S.C. 1 *et seq.*).

(j) [Reserved]

(k) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(l) (i) *Derivative* means:

(A) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)), and as those terms are further jointly defined by the CFTC and SEC by joint regulation, interpretation, guidance, or other action, in consultation with the Board pursuant to section 712(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. 8302(d));

(B) Any purchase or sale of a nonfinancial commodity for deferred shipment or delivery that is intended to be physically settled;

(C) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(D) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(E) Any agreement, contract, or transactions in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(F) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(ii) A derivative does not include:

(A) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, guidance, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(B) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(m) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(n) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.

(o) *Foreign banking organization* has the same meaning as in § 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)).

(p) *Insured depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include any insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)).

(q) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable.

(r) *Nonbank financial company supervised by the Board* has the meaning specified in section 102 of the Financial Stability Act of 2010 (12 U.S.C. 5311).

(s) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under § 211.23(a) of the Board's Regulation K (12 CFR 211.23(a)).

(t) *Resident of the United States* means:

(1) Any natural person resident in the United States;

(2) Any partnership, corporation or other business entity organized or incorporated under the laws of the United States or any State;

(3) Any estate of which any executor or administrator is a resident of the United States;

(4) Any trust of which any trustee, beneficiary or, if the trust is revocable, any settlor is a resident of the United States;

(5) Any agency or branch of a foreign entity located in the United States;

(6) Any discretionary or non-discretionary account or similar account (other than an estate or trust) held by a dealer or fiduciary for the benefit or account of a resident of the United States;

(7) Any discretionary account or similar account (other than an estate or trust) held by a dealer or fiduciary organized or incorporated in the United States, or (if an individual) a resident of the United States; or

(8) Any person organized or incorporated under the laws of any foreign jurisdiction formed by or for a resident of the United States principally for the purpose of engaging in one or more transactions described in § __.6(d)(1) or § __.13(c)(1).

(u) *SEC* means the Securities and Exchange Commission.

(v) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(w) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(x) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(y) *Securities Act* means the Securities Act of 1933 (15 U.S.C. 77a *et seq.*).

(z) *Separate account* means an account established and maintained by an insurance company subject to regulation by a State insurance regulator or a foreign insurance regulator under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(aa) *State* means any State, territory or possession of the United States, and the District of Columbia.

(bb) *Subsidiary* has the same meaning as in section 2(d) of the BHC Act (12 U.S.C. 1841(d)).

Subpart B—Proprietary Trading

§ __.3 Prohibition on proprietary trading.

(a) *Prohibition.* Except as otherwise provided in this subpart, a covered banking entity may not engage in proprietary trading.

(b) *Definition of ''proprietary trading'' and related terms.* For purposes of this subpart:

(1) *Proprietary trading* means engaging as principal for the trading account of the covered banking entity in any purchase or sale of one or more covered financial positions. Proprietary trading does not include acting solely as agent, broker, or custodian for an unaffiliated third party.

(2) *Trading account.*

(i) *Trading account* means any account that is used by a covered banking entity to:

(A) Acquire or take one or more covered financial positions principally for the purpose of:

(1) Short-term resale;

(2) Benefitting from actual or expected short-term price movements;

(3) Realizing short-term arbitrage profits; or

(4) Hedging one or more positions described in paragraphs (b)(2)(i)(A)(*1*), (*2*), or (*3*) of this section;

(B) Acquire or take one or more covered financial positions, other than positions that are foreign exchange derivatives, commodity derivatives, or contracts of sale of a commodity for future delivery, that are market risk capital rule covered positions, if the covered banking entity, or any affiliate of the covered banking entity that is a bank holding company, calculates risk-based capital ratios under the market risk capital rule as defined in paragraph (c)(8) of this section; or

(C) Acquire or take one or more covered financial position for any purpose, if the covered banking entity is:

(1) A dealer or municipal securities dealer that is registered with the SEC under the Exchange Act, to the extent the position is acquired or taken in connection with the activities of the dealer or municipal securities dealer that require it to be registered under that Act;

(2) A government securities dealer that is registered, or that has filed notice, with an appropriate regulatory agency (as that term is defined in section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)), to the extent the position is acquired or taken in connection with the activities of the government securities dealer that require it to be registered, or to file notice, under that Act;

(3) A swap dealer that is registered with the CFTC under the Commodity Exchange Act, to the extent the position is acquired or taken in connection with the activities of the swap dealer that require it to be registered under that Act;

(4) A security-based swap dealer that is registered with the SEC under the Exchange Act, to the extent the position is acquired or taken in connection with the activities of the security-based swap dealer that require it to be registered under that Act; or

(5) Engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States to the extent the position is acquired or taken in connection with the activities of such business.

(ii) *Rebuttable presumption for certain positions.* An account shall be presumed to be a trading account if it is used to acquire or take a covered financial position, other than a covered financial position described in paragraph (b)(2)(i)(B) or (C) of this section, that the covered banking entity

holds for a period of sixty days or less, unless the covered banking entity can demonstrate, based on all the facts and circumstances, that the covered financial position, either individually or as a category, was not acquired or taken principally for any of the purposes described in paragraph (b)(2)(i)(A) of this section.

(iii) An account shall not be deemed a trading account for purposes of paragraph (b)(2)(i) of this section to the extent that such account is used to acquire or take a position in one or more covered financial positions:

(A) That arise under a repurchase or reverse repurchase agreement pursuant to which the covered banking entity has simultaneously agreed, in writing, to both purchase and sell a stated asset, at stated prices, and on stated dates or on demand with the same counterparty;

(B) That arise under a transaction in which the covered banking entity lends or borrows a security temporarily to or from another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such security, and has the right to terminate the transaction and to recall the loaned security on terms agreed by the parties;

(C) For the *bona fide* purpose of liquidity management and in accordance with a documented liquidity management plan of the covered banking entity that:

(1) Specifically contemplates and authorizes the particular instrument to be used for liquidity management purposes, its profile with respect to market, credit and other risks, and the liquidity circumstances in which the particular instrument may or must be used;

(2) Requires that any transaction contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the covered banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(3) Requires that any position taken for liquidity management purposes be highly liquid and limited to financial instruments the market, credit and other risks of which the covered banking entity does not expect to give rise to appreciable profits or losses as a result of short-term price movements;

(4) Limits any position taken for liquidity management purposes, together with any other positions taken for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations, as estimated and documented pursuant to methods specified in the plan; and

(5) Is consistent with [Agency]'s supervisory requirements, guidance and expectations regarding liquidity management; or

(D) That are acquired or taken by a covered banking entity that is a derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) or a clearing agency registered with the SEC under section 17A of the Exchange Act (15 U.S.C. 78q–1) in connection with clearing derivatives or securities transactions.

(3) *Covered financial position.*

(i) *Covered financial position* means any position, including any long, short, synthetic or other position, in:

(A) A security, including an option on a security;

(B) A derivative, including an option on a derivative; or

(C) A contract of sale of a commodity for future delivery, or option on a contract of sale of a commodity for future delivery.

(ii) A covered financial position does not include any position that is:

(A) A loan;

(B) A commodity; or

(C) Foreign exchange or currency.

(c) *Definition of other terms related to proprietary trading.* For purposes of this subpart:

(1) *Commodity* has the same meaning as in section 1a(9) of the Commodity Exchange Act (7 U.S.C. 1a(9)), except that a commodity does not include any security;

(2) *Contract of sale of a commodity for future delivery* means a contract of sale (as that term is defined in section 1a(13) of the Commodity Exchange Act (7 U.S.C. 1a(13)) for future delivery (as that term is defined in section 1a(27) of the Commodity Exchange Act (7 U.S.C. 1a(27)).

(3) *Exempted security* has the same meaning as in section 3(a)(12)(A) of the Exchange Act (15 U.S.C. 78c(a)(12)(A)).

(4) *Foreign insurance regulator* means the insurance commission, or a similar official or agency, of one or more countries other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(5) General account means, with respect to an insurance company, all of the assets of the insurance company that are not legally segregated and allocated to separate accounts under applicable State or foreign law.

(6) *Government securities* has the same meaning as in section 3(a)(42) of the Exchange Act (15 U.S.C. 78c(a)(42)).

(7) *Market risk capital rule covered position* means a covered position as that term is defined for purposes of:

(i) In the case of a covered banking entity that is a bank holding company or insured depository institution, the market risk capital rule that is applicable to the covered banking entity; and

(ii) In the case of a covered banking entity that is affiliated with a bank holding company, other than a covered banking entity to which a market risk capital rule is applicable, the market risk capital rule that is applicable to the affiliated bank holding company.

(8) *Market risk capital rule* means 12 CFR 3, Appendix B, 12 CFR 208, Appendix E, 12 CFR 225, Appendix E, and 12 CFR 325, Appendix C, as applicable.

(9) *Municipal securities* has the same meaning as in section 3(a)(29) of the Exchange Act (15 U.S.C. 78c(a)(29)).

(10) *Security-based swap* has the meaning specified in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)).

(11) *Swap* has the meaning specified in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)).

(12) *State insurance regulator* means the insurance commission, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

§ __.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities.*

(1) *Permitted underwriting activities.* The prohibition on proprietary trading contained in § ____.3(a) does not apply to the purchase or sale of a covered financial position by a covered banking entity that is made in connection with the covered banking entity's underwriting activities.

(2) *Requirements.* For purposes of paragraph (a)(1) of this section, a purchase or sale of a covered financial position shall be deemed to be made in connection with a covered banking entity's underwriting activities only if:

(i) The covered banking entity has established the internal compliance program required by subpart D of this part that is designed to ensure the covered banking entity's compliance with the requirements of paragraph (a)(2) of this section, including reasonably designed written policies and procedures, internal controls, and independent testing;

(ii) The covered financial position is a security;

(iii) The purchase or sale is effected solely in connection with a distribution of securities for which the covered banking entity is acting as underwriter;

(iv) The covered banking entity is:

(A) With respect to a purchase or sale effected in connection with a distribution of one or more covered financial positions that are securities, other than exempted securities, security-based swaps, commercial paper, bankers' acceptances, or commercial bills:

(1) A dealer that is registered with the SEC under section 15 of the Exchange Act (15 U.S.C. 78*o*), or a person that is exempt from registration or excluded from regulation as a dealer thereunder; or

(2) Engaged in the business of a dealer outside of the United States and subject to substantive regulation of such business in the jurisdiction where the business is located;

(B) With respect to a purchase or sale effected as part of a distribution of one or more covered financial positions that are municipal securities, a municipal securities dealer that is registered under section 15B of the Exchange Act (15 U.S.C. 78*o*–4) or exempt from registration thereunder; or

(C) With respect to a purchase or sale effected as part of a distribution of one or more covered financial positions that are government securities, a government securities dealer that is registered, or that has filed notice, under section 15C of the Exchange Act (15 U.S.C. 78*o*–5) or exempt from registration thereunder;

(v) The underwriting activities of the covered banking entity with respect to the covered financial position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties;

(vi) The underwriting activities of the covered banking entity are designed to generate revenues primarily from fees, commissions, underwriting spreads or other income not attributable to:

(A) Appreciation in the value of covered financial positions related to such activities; or

(B) The hedging of covered financial positions related to such activities; and

(vii) The compensation arrangements of persons performing underwriting activities are designed not to reward proprietary risk-taking.

(3) *Definition of distribution.* For purposes of paragraph (a) of this section, a *distribution* of securities means an offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods.

(4) *Definition of underwriter.* For purposes of paragraph (a) of this section, *underwriter* means:

(i) A person who has agreed with an issuer of securities or selling security holder:

(A) To purchase securities for distribution;

(B) To engage in a distribution of securities for or on behalf of such issuer or selling security holder; or

(C) To manage a distribution of securities for or on behalf of such issuer or selling security holder; and

(ii) A person who has an agreement with another person described in paragraph (a)(4)(i) of this section to engage in a distribution of such securities for or on behalf of the issuer or selling security holder.

(b) *Market making-related activities.*

(1) *Permitted market making-related activities.* The prohibition on proprietary trading contained in § ____.3(a) does not apply to the purchase or sale of a covered financial position by a covered banking entity that is made in connection with the covered banking entity's market making-related activities.

(2) *Requirements.* For purposes of paragraph (b)(1) of this section, a purchase or sale of a covered financial position shall be deemed to be made in connection with a covered banking entity's market making-related activities only if:

(i) The covered banking entity has established the internal compliance program required by subpart D that is designed to ensure the covered banking entity's compliance with the requirements of paragraph (b)(2) of this section, including reasonably designed written policies and procedures, internal controls, and independent testing;

(ii) The trading desk or other organizational unit that conducts the purchase or sale holds itself out as being willing to buy and sell, including through entering into long and short positions in, the covered financial position for its own account on a regular or continuous basis;

(iii) The market making-related activities of the trading desk or other organizational unit that conducts the purchase or sale are, with respect to the covered financial position, designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties;

(iv) The covered banking entity is:

(A) With respect to a purchase or sale of one or more covered financial positions that are securities, other than exempted securities, security-based swaps, commercial paper, bankers' acceptances, or commercial bills:

(1) A dealer that is registered with the SEC under section 15 of the Exchange Act (15 U.S.C. 78*o*), or a person that is exempt from registration or excluded from regulation as a dealer thereunder; or

(2) Engaged in the business of a dealer outside of the United States and subject to substantive regulation of such business in the jurisdiction where the business is located;

(B) With respect to a purchase or sale of one or more covered financial positions that are swaps:

(1) A swap dealer that is registered with the CFTC under the Commodity Exchange Act (7 U.S.C. 1a) or a person that is exempt from registration thereunder; or

(2) Engaged in the business of a swap dealer outside the United States and subject to substantive regulation of such business in the jurisdiction where the business is located;

(C) With respect to a purchase or sale of one or more covered financial positions that are security-based swaps:

(1) A security-based swap dealer that is registered with the SEC under section 15F of the Exchange Act (15 U.S.C. 78*o*–10) or a person that is exempt from registration thereunder; or

(2) Engaged in the business of a security-based swap dealer outside of the United States and subject to substantive regulation of such business in the jurisdiction where the business is located;

(D) With respect to a purchase or sale of one or more covered financial positions that are municipal securities, a municipal securities dealer that is registered under section 15B of the Exchange Act (15 U.S.C. 78*o*–4) or a person that is exempt from registration thereunder; or

(E) With respect to a purchase or sale of one or more covered financial positions that are government securities, a government securities dealer that is registered, or that has filed notice, under section 15C of the Exchange Act (15 U.S.C. 78*o*–5) or a person that is exempt from registration thereunder;

(v) The market making-related activities of the trading desk or other organizational unit that conducts the purchase or sale are designed to generate revenues primarily from fees, commissions, bid/ask spreads or other income not attributable to:

(A) Appreciation in the value of covered financial positions it holds in trading accounts; or

(B) The hedging of covered financial positions it holds in trading accounts;

(vi) The market making-related activities of the trading desk or other organizational unit that conducts the purchase or sale are consistent with the

commentary provided in Appendix B; and

(vii) The compensation arrangements of persons performing the market making-related activities are designed not to reward proprietary risk-taking.

(3) *Market making-related hedging.* For purposes of paragraph (b)(1) of this section, a purchase or sale of a covered financial position shall also be deemed to be made in connection with a covered banking entity's market making-related activities if:

(i) The covered financial position is purchased or sold to reduce the specific risks to the covered banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings acquired pursuant to paragraph (b) of this section; and

(ii) The purchase or sale meets all of the requirements described in § __.5(b) and, if applicable, § __.5(c).

§ ____.5 Permitted risk-mitigating hedging activities.

(a) *Permitted risk-mitigating hedging activities.* The prohibition on proprietary trading contained in § ____.3(a) does not apply to the purchase or sale of a covered financial position by a covered banking entity that is made in connection with and related to individual or aggregated positions, contracts, or other holdings of a covered banking entity and is designed to reduce the specific risks to the covered banking entity in connection with and related to such positions, contracts, or other holdings.

(b) *Requirements.* For purposes of paragraph (a) of this section, a purchase or sale of a covered financial position shall be deemed to be in connection with and related to individual or aggregated positions, contracts, or other holdings of a covered banking entity and designed to reduce the specific risks to the covered banking entity in connection with and related to such positions, contracts, or other holdings only if:

(1) The covered banking entity has established the internal compliance program required by subpart D designed to ensure the covered banking entity's compliance with the requirements of paragraph (b) of this section, including reasonably designed written policies and procedures regarding the instruments, techniques and strategies that may be used for hedging, internal controls and monitoring procedures, and independent testing;

(2) The purchase or sale:

(i) Is made in accordance with the written policies, procedures and internal controls established by the covered banking entity pursuant to subpart D of this part;

(ii) Hedges or otherwise mitigates one or more specific risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, basis risk, or similar risks, arising in connection with and related to individual or aggregated positions, contracts, or other holdings of a covered banking entity;

(iii) Is reasonably correlated, based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks the purchase or sale is intended to hedge or otherwise mitigate;

(iv) Does not give rise, at the inception of the hedge, to significant exposures that were not already present in the individual or aggregated positions, contracts, or other holdings of a covered banking entity and that are not hedged contemporaneously;

(v) Is subject to continuing review, monitoring and management by the covered banking entity that:

(A) Is consistent with the written hedging policies and procedures required under paragraph (b)(1) of this section; and

(B) Maintains a reasonable level of correlation, based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks the purchase or sale is intended to hedge or otherwise mitigate; and

(C) Mitigates any significant exposure arising out of the hedge after inception; and

(vi) The compensation arrangements of persons performing the risk-mitigating hedging activities are designed not to reward proprietary risk-taking.

(c) *Documentation.* With respect to any purchase, sale, or series of purchases or sales conducted by a covered banking entity pursuant to this § __.5 for risk-mitigating hedging purposes that is established at a level of organization that is different than the level of organization establishing or responsible for the positions, contracts, or other holdings the risks of which the purchase, sale, or series of purchases or sales are designed to reduce, the covered banking entity must, at a minimum, document, at the time the purchase, sale, or series of purchases or sales are conducted:

(1) The risk-mitigating purpose of the purchase, sale, or series of purchases or sales;

(2) The risks of the individual or aggregated positions, contracts, or other holdings of a covered banking entity that the purchase, sale, or series of purchases or sales are designed to reduce; and

(3) The level of organization that is establishing the hedge.

§ __.6 Other permitted proprietary trading activities.

(a) *Permitted trading in government obligations.*

(1) The prohibition on proprietary trading contained in § __.3(a) does not apply to the purchase or sale by a covered banking entity of a covered financial position that is:

(i) An obligation of the United States or any agency thereof;

(ii) An obligation, participation, or other instrument of or issued by the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation or a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*); or

(iii) An obligation of any State or any political subdivision thereof.

(2) An obligation or other instrument described in paragraphs (a)(1)(i), (ii) or (iii) of this section shall include both general obligations and limited obligations, such as revenue bonds.

(b) *Permitted trading on behalf of customers.* (1) The prohibition on proprietary trading contained in § __.3(a) does not apply to the purchase or sale of a covered financial position by a covered banking entity on behalf of customers.

(2) For purposes of paragraph (b)(1) of this section, a purchase or sale of a covered financial position by a covered banking entity shall be considered to be on behalf of customers if:

(i) The purchase or sale:

(A) Is conducted by a covered banking entity acting as investment adviser, commodity trading advisor, trustee, or in a similar fiduciary capacity for a customer;

(B) Is conducted for the account of the customer; and

(C) Involves solely covered financial positions of which the customer, and not the covered banking entity or any subsidiary or affiliate of the covered banking entity, is beneficial owner (including as a result of having long or short exposure under the relevant covered financial position);

(ii) The covered banking entity is acting as riskless principal in a transaction in which the covered banking entity, after receiving an order to purchase (or sell) a covered financial

position from a customer, purchases (or sells) the covered financial position for its own account to offset a contemporaneous sale to (or purchase from) the customer; or

(iii) The covered banking entity is an insurance company that purchases or sells a covered financial position for a separate account, if:

(A) The insurance company is directly engaged in the business of insurance and subject to regulation by a State insurance regulator or foreign insurance regulator;

(B) The insurance company purchases or sells the covered financial position solely for a separate account established by the insurance company in connection with one or more insurance policies issued by that insurance company;

(C) All profits and losses arising from the purchase or sale of a covered financial position are allocated to the separate account and inure to the benefit or detriment of the owners of the insurance policies supported by the separate account, and not the insurance company; and

(D) The purchase or sale is conducted in compliance with, and subject to, the insurance company investment and other laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled.

(c) *Permitted trading by a regulated insurance company.* The prohibition on proprietary trading contained in § __.3(a) does not apply to the purchase or sale of a covered financial position by an insurance company or any affiliate of an insurance company if:

(1) The insurance company is directly engaged in the business of insurance and subject to regulation by a State insurance regulator or foreign insurance regulator;

(2) The insurance company or its affiliate purchases or sells the covered financial position solely for the general account of the insurance company;

(3) The purchase or sale is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(4) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (c)(3) of this section is insufficient to protect the safety and soundness of the covered banking entity, or of the financial stability of the United States.

(d) *Permitted trading outside of the United States.*

(1) The prohibition on proprietary trading contained in § __.3(a) does not apply to the purchase or sale of a covered financial position by a covered banking entity if:

(i) The covered banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The purchase or sale is conducted pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act; and

(iii) The purchase or sale occurs solely outside of the United States.

(2) A purchase or sale shall be deemed to be conducted pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act only if:

(i) With respect to a covered banking entity that is a foreign banking organization, the banking entity is a qualifying foreign banking organization and is conducting the purchase or sale in compliance with subpart B of the Board's Regulation K (12 CFR 211.20 through 211.30); or

(ii) With respect to a covered banking entity that is not a foreign banking organization, the covered banking entity meets at least two of the following requirements:

(A) Total assets of the covered banking entity held outside of the United States exceed total assets of the covered banking entity held in the United States;

(B) Total revenues derived from the business of the covered banking entity outside of the United States exceed total revenues derived from the business of the covered banking entity in the United States; or

(C) Total net income derived from the business of the covered banking entity outside of the United States exceeds total net income derived from the business of the covered banking entity in the United States.

(3) A purchase or sale shall be deemed to have occurred solely outside of the United States only if:

(i) The covered banking entity conducting the purchase or sale is not organized under the laws of the United States or of one or more States;

(ii) No party to the purchase or sale is a resident of the United States;

(iii) No personnel of the covered banking entity who is directly involved in the purchase or sale is physically located in the United States; and

(iv) The purchase or sale is executed wholly outside of the United States.

§ __.7 Reporting and recordkeeping requirements applicable to trading activities.

A covered banking entity engaged in any proprietary trading activity permitted under §§ __.4 through __.6 shall comply with:

(a) The reporting and recordkeeping requirements described in Appendix A to this part, if the covered banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion;

(b) The recordkeeping requirements required under § __.20 and appendix C to this part, as applicable; and

(c) Such other reporting and recordkeeping requirements as [Agency] may impose to evaluate the covered banking entity's compliance with this subpart.

§ __.8 Limitations on permitted proprietary trading activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ __.4 through __.6 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the covered banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the covered banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the covered banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* For purposes of this section, a material conflict of interest between a covered banking entity and its clients, customers, or counterparties exists if the covered banking entity engages in any transaction, class of transactions, or activity that would involve or result in the covered banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, unless:

(1) *Timely and effective disclosure and opportunity to negate or substantially mitigate.* Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, for which a conflict of interest may arise, the covered banking entity:

(i) Makes clear, timely, and effective disclosure of the conflict of interest,

together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(ii) Makes such disclosure explicitly and effectively, and in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(2) *Information barriers.* The covered banking entity has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the covered banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A covered banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the covered banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a covered banking entity, significantly increase the likelihood that the covered banking entity would incur a substantial financial loss or would fail.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a covered banking entity, significantly increase the likelihood that the covered banking entity would incur a substantial financial loss or would fail.

§ __.9 [Reserved]

Subpart C—Covered Funds Activities and Investments

§ __.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

(a) *Prohibition.* Except as otherwise provided in this subpart, a covered banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(b) *Definitions.* For purposes of this part:

(1) *Covered fund* means:

(i) An issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), *but for* section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or (7));

(ii) A commodity pool, as defined in section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10));

(iii) Any issuer, as defined in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(22)), that is organized or offered outside of the United States that would be a covered fund as defined in paragraphs (b)(1)(i), (ii), or (iv) of this section, were it organized or offered under the laws, or offered to one or more residents, of the United States or of one or more States; and

(iv) Any such similar fund as the appropriate Federal banking agencies, the SEC, and the CFTC may determine, by rule, as provided in section 13(b)(2) of the BHC Act.

(2) *Director* has the same meaning as provided in § 215.2(d)(1) of the Board's Regulation O (12 CFR 215.2(d)(1)).

(3) *Ownership interest.*

(i) *Ownership interest* means any equity, partnership, or other similar interest (including, without limitation, a share, equity security, warrant, option, general partnership interest, limited partnership interest, membership interest, trust certificate, or other similar instrument) in a covered fund, whether voting or nonvoting, or any derivative of such interest.

(ii) *Ownership interest* does not include, with respect to a covered fund:

(A) *Carried interest.* An interest held by a covered banking entity (or an affiliate, subsidiary or employee thereof) in a covered fund for which the covered banking entity (or an affiliate, subsidiary or employee thereof) serves as investment manager, investment adviser or commodity trading adviser, so long as:

(*1*) The sole purpose and effect of the interest is to allow the covered banking entity (or the affiliate, subsidiary or employee thereof) to share in the profits of the covered fund as performance compensation for services provided to the covered fund by the covered banking entity (or the affiliate, subsidiary or employee thereof), provided that the covered banking entity (or the affiliate, subsidiary or employee thereof) may be obligated under the terms of such interest to return profits previously received;

(*2*) All such profit, once allocated, is distributed to the covered banking entity (or the affiliate, subsidiary or employee thereof) promptly after being earned or, if not so distributed, the reinvested profit of the covered banking entity (or the affiliate, subsidiary or employee thereof) does not share in the subsequent profits and losses of the covered fund;

(*3*) The covered banking entity (or the affiliate, subsidiary or employee thereof) does not provide funds to the covered fund in connection with acquiring or retaining this interest; and

(*4*) The interest is not transferable by the covered banking entity (or the affiliate, subsidiary or employee thereof) except to another affiliate or subsidiary thereof.

(4) *Prime brokerage transaction* means one or more products or services provided by a covered banking entity to a covered fund, such as custody, clearance, securities borrowing or lending services, trade execution, or financing, data, operational, and portfolio management support.

(5) *Sponsor,* with respect to a covered fund, means:

(i) To serve as a general partner, managing member, trustee, or commodity pool operator of a covered fund;

(ii) In any manner to select or to control (or to have employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a covered fund; or

(iii) To share with a covered fund, for corporate, marketing, promotional, or other purposes, the same name or a variation of the same name.

(6) *Trustee.* (i) For purposes of this subpart, a trustee does not include a trustee that does not exercise investment discretion with respect to a covered fund, including a directed trustee, as that term is used in section 403(a)(1) of the Employee's Retirement Income Security Act (29 U.S.C. 1103(a)(1)).

(ii) Any covered banking entity that directs a person identified in paragraph (b)(6)(i) of this section, or that possesses authority and discretion to manage and control the assets of a covered fund for which such person identified in paragraph (b)(6)(i) of this section serves as trustee, shall be considered a trustee of such covered fund.

§ __.11 Permitted organizing and offering of a covered fund.

Section __.10(a) does not prohibit a covered banking entity from, directly or indirectly, organizing and offering a covered fund, including serving as a general partner, managing member, trustee, or commodity pool operator of the covered fund and in any manner

selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees, or management of the covered fund, including any necessary expenses for the foregoing, only if:

(a) The covered banking entity provides *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;

(b) The covered fund is organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the covered banking entity, pursuant to a credible plan or similar documentation outlining how the covered banking entity intends to provide advisory or similar services to its customers through organizing and offering such fund;

(c) The covered banking entity does not acquire or retain an ownership interest in the covered fund except as permitted under this subpart;

(d) The covered banking entity complies with the restrictions under § __.16 of this subpart;

(e) The covered banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests;

(f) The covered fund, for corporate, marketing, promotional, or other purposes:

(1) Does not share the same name or a variation of the same name with the covered banking entity (or an affiliate or subsidiary thereof); and

(2) Does not use the word ''bank'' in its name;

(g) No director or employee of the covered banking entity takes or retains an ownership interest in the covered fund, except for any director or employee of the covered banking entity who is directly engaged in providing investment advisory or other services to the covered fund; and

(h) The covered banking entity:

(1) Clearly and conspicuously discloses, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents):

(i) That ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the covered banking entity and its affiliates or subsidiaries]; therefore, [the covered banking entity's and its affiliates' or subsidiaries'] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by the [covered banking entity and its affiliates or subsidiaries] in their capacity as investors in the [covered fund]'';

(ii) That such investor should read the fund offering documents before investing in the covered fund;

(iii) That the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case);

(iv) The role of the covered banking entity and its affiliates, subsidiaries and employees in sponsoring or providing any services to the covered fund; and

(2) Complies with any additional rules of the appropriate Federal banking agencies, the SEC, or the CFTC, as provided in section 13(b)(2) of the BHC Act, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the covered banking entity and its affiliates or subsidiaries.

§ __.12 Permitted investment in a covered fund.

(a) *Authority and limitations on permitted investments in covered funds.* (1) The prohibition contained in § __.10(a) does not apply with respect to a covered banking entity acquiring and retaining any ownership interest in a covered fund that the covered banking entity or an affiliate or subsidiary thereof organizes and offers, for the purposes of:

(i) *Establishment.* Establishing the covered fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors as required by paragraph (a)(2)(i) of this section; or

(ii) *De minimis investment.* Making and retaining an investment in the covered fund that does not exceed 3 percent of the total outstanding ownership interests in the fund.

(2) *Ownership limits.*

(i) With respect to an investment in any covered fund pursuant to paragraph (a)(1)(i) of this section, the covered banking entity:

(A) Must actively seek unaffiliated investors to reduce through redemption, sale, dilution, or other methods the aggregate amount of all ownership interests of the covered banking entity in any covered fund under § __.12 to the amount permitted in paragraph (a)(2)(i)(B) of this section; and

(B) May not exceed 3 percent of the total amount or value of outstanding ownership interests of the fund not later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board pursuant to paragraph (e) of this section); and

(ii) The aggregate value of all ownership interests of the covered banking entity in all covered funds under § __.12 may not exceed 3 percent of the tier 1 capital of the covered banking entity, as provided under paragraph (c) of this section.

(b) *Limitations on investments in a single covered fund.* For purposes of determining whether a covered banking entity is in compliance with the limitations and restrictions on permitted investments in covered funds contained in paragraph (a) of this section, a covered banking entity shall calculate its amount and value of a permitted investment in a single covered fund as follows:

(1) *Attribution of ownership interests to a covered banking entity.* The amount and value of a banking entity's permitted investment in any single covered fund shall include:

(i) *Controlled investments.* Any ownership interest held under § __.12 by any entity that is controlled, directly or indirectly, by the covered banking entity for purposes of this part; and

(ii) *Noncontrolled investments.* The *pro rata* share of any ownership interest held under § __.12 by any covered fund that is not controlled by the covered banking entity but in which the covered banking entity owns, controls, or holds with the power to vote more than 5 percent of the voting shares.

(2) *Calculation of amount of ownership interests in a single covered fund.* For purposes of determining whether an investment in a single covered fund does not exceed 3 percent of the total outstanding ownership interests of the fund under paragraph (a)(2)(i)(B) of this section:

(i) The aggregate amount of all ownership interests of the covered banking entity shall be the greater of (without regard to committed funds not yet called for investment):

(A) The value of any investment or capital contribution made with respect to all ownership interests held under § __.12 by the covered banking entity in the covered fund, divided by the value of all investments or capital contributions, respectively, made by all persons in that covered fund; or

(B) The total number of ownership interests held under § __.12 by the covered banking entity in a covered fund divided by the total number of ownership interests held by all persons in that covered fund.

(ii) *Inclusion of certain parallel investments.* To the extent that a covered banking entity is contractually obligated to directly invest in, or is

found to be acting in concert through knowing participation in a joint activity or parallel action toward a common goal of investing in, one or more investments with a covered fund that is organized and offered by the covered banking entity, whether or not pursuant to an express agreement, such investments shall be included in any calculation required under paragraph (a)(2) of this section.

(3) *Timing of single covered fund investment calculation.* The aggregate amount of all ownership interests of a covered banking entity in a single covered fund may at no time exceed the limits in this paragraph after the conclusion of the period provided in paragraph (a)(2)(i)(B) of this section.

(4) *Methodology and standards for calculation.* For purposes of determining the amount or value of its investment in a covered fund under this paragraph (b), a covered banking entity must calculate its investment in the same manner and according to the same standards utilized by the covered fund for determining the aggregate value of the fund's assets and ownership interests.

(c) *Aggregate permitted investments in all covered funds.* (1) For purposes of determining the aggregate value of all permitted investments in all covered funds by a covered banking entity under paragraph (a)(2)(ii) of this section, the aggregate value of all ownership interests held by that covered banking entity shall be the sum of the value of each investment in a covered fund held under § __.12, as determined in accordance with applicable accounting standards.

(2) *Calculation of tier 1 capital.* For purposes of determining compliance with paragraph (a)(2)(ii) of this section:

(i) *Entities that are required to hold and report tier 1 capital.* If a covered banking entity is required to calculate and report tier 1 capital, the covered banking entity's tier 1 capital shall be equal to the amount of tier 1 capital calculated by that covered banking entity as of the last day of the most recent calendar quarter that has ended, as reported to its primary financial regulatory agency, as defined in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and

(ii) If a covered banking entity is not required to calculate and report tier 1 capital, the covered banking entity's tier 1 capital shall be determined to be equal to:

(A) In the case of a covered banking entity that is controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital, the amount of tier 1 capital reported by such controlling depository institution pursuant to paragraph (c)(2)(i) of this section;

(B) In the case of a covered banking entity that is not controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital:

(*1*) *Bank holding company subsidiaries.* If the covered banking entity is a subsidiary of a bank holding company or company that is treated as a bank holding company, the amount of tier 1 capital reported by the top-tier affiliate of such covered banking entity that calculates and reports tier 1 capital, pursuant to paragraph (c)(2)(i) of this section; and

(*2*) *Other holding companies and any subsidiary or affiliate thereof.* If the covered banking entity is not a subsidiary of a bank holding company or a company that is treated as a bank holding company, the total amount of shareholders' equity of the top-tier affiliate within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.

(3) A covered banking entity's aggregate permitted investment in all covered funds shall be calculated as of the last day of each calendar quarter.

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating capital pursuant to the applicable capital rules, a covered banking entity shall deduct the aggregate value of all permitted investments in all covered funds made or retained by a covered banking entity pursuant to this section (as determined under paragraph (c)(1) of this section) from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section).

(e) *Extension of time to divest an ownership interest.* (1) Upon application by a covered banking entity, the Board may extend the period of time to meet the requirements under paragraphs (a)(2)(i)(A) and (B) of this section for up to 2 additional years, if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest. An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(2) of this section; and

(iii) Explain the covered banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2)(i) of this section.

(2) *Factors governing Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would:

(A) Involve or result in material conflicts of interest between the covered banking entity and its clients, customers or counterparties;

(B) Result, directly or indirectly, in a material exposure by the covered banking entity to high-risk assets or high-risk trading strategies;

(C) Pose a threat to the safety and soundness of the covered banking entity; or

(D) Pose a threat to the financial stability of the United States;

(ii) Market conditions;

(iii) The contractual terms governing the covered banking entity's interest in the covered fund;

(iv) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the covered banking entity to enable the covered banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(v) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the covered banking entity and the financial stability of the United States;

(vi) The cost to the covered banking entity of divesting or disposing of the investment within the applicable period;

(vii) Whether the divestiture or conformance of the investment would involve or result in a material conflict of interest between the covered banking entity and unaffiliated clients, customers or counterparties to which it owes a duty;

(viii) The covered banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund; and

(ix) Any other factor that the Board believes appropriate.

(3) *Consultation.* In the case of a covered banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to approval of an application by the covered banking entity for an extension under paragraph (e)(1) of this section.

(4) *Authority to impose restrictions on activities or investment during any extension period.* (i) The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the covered banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act (12 U.S.C. 1851) and this part.

(ii) *Consultation.* In the case of a covered banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to imposing conditions on the approval of a request by the covered banking entity for an extension under paragraph (e)(1) of this section.

§ __.13 Other permitted covered fund activities and investments.

(a) *Permitted investments in SBICs and related investments.* The prohibition contained in § __.10(a) does not apply with respect to acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund by a covered banking entity or an affiliate or subsidiary thereof:

(1) In one or more small business investment companies, as defined in section 102 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

(2) That is designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs); or

(3) That is a qualified rehabilitation expenditure with respect to a qualified rehabilitation building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.

(b) *Permitted risk-mitigating hedging activities.*

(1) The prohibition contained in § __.10(a) does not apply with respect to an ownership interest in a covered fund by a covered banking entity, provided that the acquisition or retention of the ownership interest is:

(i) Made in connection with and related to individual or aggregated obligations or liabilities of the covered banking entity that are:

(A) Taken by the covered banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund, or

(B) Directly connected to a compensation arrangement with an employee that directly provides investment advisory or other services to the covered fund; and

(ii) Designed to reduce the specific risks to the covered banking entity in connection with and related to such obligations or liabilities.

(2) *Requirements.* For purposes of paragraph (b)(1) of this section, acquiring or retaining an ownership interest in a covered fund by a covered banking entity shall be a permissible risk-mitigating hedging activity under this section only if:

(i) The covered banking entity has established the internal compliance program required by subpart D designed to ensure the covered banking entity's compliance with the requirements of this paragraph (b)(2) of this section including reasonably designed written policies and procedures regarding the instruments, techniques and strategies that may be used for hedging, internal controls and monitoring procedures, and independent testing;

(ii) The acquisition or retention of an ownership interest in a covered fund:

(A) Is made in accordance with the written policies, procedures and internal controls established by the covered banking entity pursuant to subpart D;

(B) Hedges or otherwise mitigates an exposure to a covered fund through an offsetting exposure to the same covered fund and in the same amount of ownership interest in that covered fund that:

(*1*) Arises out of a transaction conducted solely to accommodate a specific customer request with respect to, or

(*2*) Is directly connected to its compensation arrangement with an employee that directly provides investment advisory or other services to, that covered fund;

(C) Does not give rise, at the inception of the hedge, to significant exposures that were not already present in individual or aggregated positions, contracts, or other holdings of a covered banking entity and that are not hedged contemporaneously; and

(D) Is subject to continuing review, monitoring and management by the covered banking entity that:

(*1*) Is consistent with its written hedging policies and procedures;

(*2*) Maintains a substantially similar offsetting exposure to the same amount and type of ownership interest, based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks the purchase or sale is intended to hedge or otherwise mitigate; and

(*3*) Mitigates any significant exposure arising out of the hedge after inception; and

(iii) The compensation arrangements of persons performing the risk-mitigating hedging activities are designed not to reward proprietary risk-taking.

(3) *Documentation.* With respect to any acquisition or retention of an ownership interest in a covered fund by a covered banking entity pursuant to this paragraph (b), the covered banking entity must document, at the time the transaction is conducted:

(i) The risk-mitigating purpose of the acquisition or retention of an ownership interest in a covered fund;

(ii) The risks of the individual or aggregated obligation or liability of a covered banking entity that the acquisition or retention of an ownership interest in a covered fund is designed to reduce; and

(iii) The level of organization that is establishing the hedge.

(c) *Certain permitted covered fund activities and investments outside of the United States.*

(1) The prohibition contained in § __.10(a) does not apply to the acquisition or retention of any ownership interest in, or the sponsorship of, a covered fund by a covered banking entity if:

(i) The covered banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The activity is conducted pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act;

(iii) No ownership interest in such covered fund is offered for sale or sold to a resident of the United States; and

(iv) The activity occurs solely outside of the United States.

(2) An activity shall be considered to be conducted pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act only if:

(i) With respect to a covered banking entity that is a foreign banking organization, the covered banking entity is a qualifying foreign banking organization and is conducting the activity in compliance with subpart B of the Board's Regulation K (12 CFR 211.20 *et seq.*); or

(ii) With respect to a covered banking entity that is not a foreign banking organization, the covered banking entity

meets at least two of the following requirements:

(A) Total assets of the covered banking entity held outside of the United States exceed total assets of the covered banking entity held in the United States;

(B) Total revenues derived from the business of the covered banking entity outside of the United States exceed total revenues derived from the business of the covered banking entity in the United States; or

(C) Total net income derived from the business of the covered banking entity outside of the United States exceeds total net income derived from the business of the covered banking entity in the United States.

(3) An activity shall be considered to have occurred solely outside of the United States only if:

(i) The covered banking entity engaging in the activity is not organized under the laws of the United States or of one or more States;

(ii) No subsidiary, affiliate, or employee of the covered banking entity that is involved in the offer or sale of an ownership interest in the covered fund is incorporated or physically located in the United States or in one or more States; and

(iii) No ownership interest in such covered fund is offered for sale or sold to a resident of the United States.

(d) *Loan securitizations.* The prohibition contained in § __.10(a) does not apply with respect to the acquisition or retention by a covered banking entity of any ownership interest in, or acting as sponsor to, a covered fund that is an issuer of asset-backed securities, the assets or holdings of which are solely comprised of:

(1) Loans;

(2) Contractual rights or assets directly arising from those loans supporting the asset-backed securities; and

(3) Interest rate or foreign exchange derivatives that:

(i) Materially relate to the terms of such loans or contractual rights or assets; and

(ii) Are used for hedging purposes with respect to the securitization structure.

§ __.14 Covered fund activities determined to be permissible.

(a) The prohibition contained in § __.10(a) does not apply to the acquisition or retention by a covered banking entity of any ownership interest in or acting as sponsor to:

(1) *Bank owned life insurance.* A separate account which is used solely for the purpose of allowing a covered banking entity to purchase an insurance policy for which the covered banking entity is the beneficiary, provided that the covered banking entity that purchases the insurance policy:

(i) Does not control the investment decisions regarding the underlying assets or holdings of the separate account; and

(ii) Holds its ownership interest in the separate account in compliance with applicable supervisory guidance regarding bank owned life insurance.

(2) *Certain other covered funds.* Any of the following entities that would otherwise qualify as a covered fund:

(i) A joint venture between the covered banking entity or one of its affiliates and any other person, provided that the joint venture:

(A) Is an operating company; and

(B) Does not engage in any activity or make any investment that is prohibited under this part;

(ii) An acquisition vehicle, provided that the sole purpose and effect of such entity is to effectuate a transaction involving the acquisition or merger of one entity with or into the covered banking entity or one of its affiliates;

(iii) An issuer of an asset-backed security, but only with respect to that amount or value of economic interest in a portion of the credit risk for an asset-backed security that is retained by a covered banking entity that is a ''securitizer'' or ''originator'' in compliance with the minimum requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and any implementing regulations issued thereunder;

(iv) A wholly-owned subsidiary of the covered banking entity that is:

(A) Engaged principally in performing *bona fide* liquidity management activities described in § __.3(b)(2)(iii)(C); and

(B) Carried on the balance sheet of the covered banking entity; and

(v) A covered fund that is an issuer of asset-backed securities described in § __.13(d), the assets or holdings of which are solely comprised of:

(A) Loans;

(B) Contractual rights or assets directly arising from those loans supporting the asset-backed securities; and

(C) Interest rate or foreign exchange derivatives that:

(*1*) Materially relate to the terms of such loans or contractual rights or assets, and

(*2*) Are used for hedging purposes with respect to the securitization structure.

(b) The prohibition contained in § __.10(a) does not apply to the acquisition or retention by a covered banking entity of any ownership interest in, or acting as sponsor to, a covered fund, but only if such ownership interest is acquired or retained by a covered banking entity (or an affiliate or subsidiary thereof):

(1) In the ordinary course of collecting a debt previously contracted in good faith, if the covered banking entity divests the ownership interest within applicable time periods provided for by [Agency]; or

(2) Pursuant to and in compliance with the conformance or extended transition period authorities provided for in subpart E of the Board's rules implementing section 13 of the BHC Act (12 CFR 248.30 through 248.35).

§ __.15 Internal controls, reporting and recordkeeping requirements applicable to covered fund activities and investments.

A covered banking entity engaged in any covered fund activity or making or holding any investment permitted under this subpart shall comply with:

(a) The internal controls, reporting, and recordkeeping requirements required under § __.20 and appendix C to this part, as applicable; and

(b) Such other reporting and recordkeeping requirements as [Agency] may deem necessary to appropriately evaluate the covered banking entity's compliance with this subpart.

§ __.16 Limitations on relationships with a covered fund.

(a) *Relationships with a covered fund.*

(1) Except as provided for in paragraph (a)(2) of this section, no covered banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § __.11, and no affiliate of such entity, may enter into a transaction with the covered fund, or with any other covered fund that is controlled by such covered fund, that would be a covered transaction as defined in section 23A of the Federal Reserve Act (12 U.S.C. 371c), as if such covered banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof.

(2) Notwithstanding paragraph (a)(1) of this section, a covered banking entity may:

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of this subpart; and

(ii) Enter into any prime brokerage transaction with any covered fund in which a covered fund managed,

sponsored, or advised by such covered banking entity (or an affiliate or subsidiary thereof) has taken an ownership interest, if:

(A) The covered banking entity is in compliance with each of the limitations set forth in § __.11 with respect to a covered fund organized and offered by such covered banking entity (or an affiliate or subsidiary thereof);

(B) The chief executive officer (or equivalent officer) of the top-tier affiliate of the covered banking entity certifies in writing annually (with a duty to update the certification if the information in the certification materially changes) that the covered banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the covered banking entity.

(b) *Restrictions on transactions with covered funds.* A covered banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § __.11, shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1), as if such covered banking entity were a member bank and such covered fund were an affiliate thereof.

(c) *Restrictions on prime brokerage transactions.* A prime brokerage transaction permitted under paragraph (a)(2)(ii) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the covered banking entity.

§ __.17 Other limitations on permitted covered fund activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ __.11 through __.14 and § __.16 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the covered banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the covered banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the covered banking entity or the financial stability of the United States.

(b) *Definition of material conflict of interest.* For purposes of this section, a material conflict of interest between a covered banking entity and its clients, customers, or counterparties exists if the covered banking entity engages in any transaction, class of transactions, or activity that would involve or result in the covered banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, unless:

(1) *Timely and effective disclosure and opportunity to negate or substantially mitigate.* Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, for which a conflict of interest may arise, the covered banking entity:

(i) Makes clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(ii) Makes such disclosure explicitly and effectively, and in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(2) *Information barriers.* The covered banking entity has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the covered banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A covered banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the covered banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a covered banking entity, significantly increase the likelihood that the covered banking entity would incur a substantial financial loss or would fail.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a covered banking entity, significantly increase the likelihood that the covered banking entity would incur a substantial financial loss or would fail.

§ __.18 [Reserved]

§ __.19 [Reserved]

Subpart D—Compliance Program Requirement; Violations

§ __.20 Program for monitoring compliance; enforcement.

(a) *Program requirement.* Except as provided in paragraph (d) of this section, each covered banking entity shall develop and provide for the continued administration of a program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part, and such program shall be appropriate for the size, scope and complexity of activities and business structure of the covered banking entity.

(b) *Contents of compliance program.* The compliance program required by paragraph (a) of this section, at a minimum, shall include:

(1) Internal written policies and procedures reasonably designed to document, describe, and monitor trading activities subject to subpart B of this part and activities and investments with respect to a covered fund subject to subpart C of this part (including those permitted under §§ __.4 through __.6 or §§ __.11 through __.16) to ensure that such activities and investments comply with section 13 of the BHC Act and this part;

(2) A system of internal controls reasonably designed to monitor and identify potential areas of noncompliance with section 13 of the BHC Act and this part in the covered banking entity's trading activities subject to subpart B of this part and activities and investments with respect to a covered fund subject to subpart C of this part (including those permitted under §§ __.4 through __.6 or §§ __.11 through __.16) and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and this part;

(3) A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part;

(4) Independent testing for the effectiveness of the compliance program

conducted by qualified personnel of the covered banking entity or by a qualified outside party;

(5) Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and

(6) Making and keeping records sufficient to demonstrate compliance with section 13 of the BHC Act and this part, which a covered banking entity must promptly provide to [Agency] upon request and retain for a period of no less than 5 years.

(c) *Additional standards.* (1) In the case of any covered banking entity described in paragraph (c)(2) of this section, the compliance program required by paragraph (a) of this section shall also satisfy the requirements and other standards contained in Appendix C to this part.

(2) A covered banking entity is subject to paragraph (c)(1) of this section if:

(i) The covered banking entity engages in proprietary trading and has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis), as measured as of the last day of each of the four prior calendar quarters:

(A) Is equal to or greater than $1 billion; or

(B) Equals 10 percent or more of its total assets;

(ii) The covered banking entity invests in, or has relationships with, a covered fund and:

(A) The covered banking entity has, together with its affiliates and subsidiaries, aggregate investments in one or more covered funds, the average value of which is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion; or

(B) Sponsors or advises, together with its affiliates and subsidiaries, one or more covered funds, the average total assets of which are, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion; or

(iii) [The Agency] deems it appropriate.

(d) *No program required for certain banking entities.* To the extent that a covered banking entity does not engage in activities or investments prohibited or restricted by subpart B or subpart C of this part, a covered banking entity will have satisfied the requirements of this section if its existing compliance policies and procedures include measures that are designed to prevent the covered banking entity from becoming engaged in such activities or making such investments and which require the covered banking entity to develop and provide for the compliance program required under paragraph (a) of this section prior to engaging in such activities or making such investments.

§ __.21 Termination of activities or investments; penalties for violations.

(a) Any covered banking entity that engages in an activity or makes an investment in violation of section 13 of the BHC Act or this part or in a manner that functions as an evasion of the requirements of section 13 of the BHC Act or this part, including through an abuse of any activity or investment permitted under subparts B or C, or otherwise violates the restrictions and requirements of section 13 of the BHC Act or this part, shall terminate the activity and, as relevant, dispose of the investment.

(b) After due notice and an opportunity for hearing, if [Agency] finds reasonable cause to believe any covered banking entity has engaged in an activity or made an investment described in paragraph (a), the [Agency] may, by order, direct the banking entity to restrict, limit, or terminate the activity and, as relevant, dispose of the investment.

(c) [Reserved]

Appendix A to Part [ ]—Reporting and Recordkeeping Requirements for Covered Trading Activities

I. Purpose

This appendix sets forth reporting and recordkeeping requirements that certain covered banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B of this part (''proprietary trading restrictions''). Pursuant to § __.7, this appendix generally applies to a covered banking entity that has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion. These entities are required to furnish periodic reports to [Agency] regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and create and maintain records documenting the preparation and content of these reports. The requirements of this appendix should be incorporated into the covered banking entity's internal compliance program under § __.20 and appendix C to this part.

The purpose of this appendix is to assist covered banking entities and [Agency] in:

(i) Better understanding and evaluating the scope, type, and profile of the covered banking entity's trading activities;

(ii) Monitoring the covered banking entity's trading activities;

(iii) Identifying trading activities that warrant further review or examination by the covered banking entity to verify compliance with the proprietary trading restrictions;

(iv) Evaluating whether the trading activities of trading units engaged in market making-related activities subject to § __.4(b) are consistent with the requirements governing permitted market making-related activities;

(v) Evaluating whether the covered trading activities of trading units that are engaged in permitted trading activity subject to §§ __.4, __.5, or __.6(a) (i.e., underwriting and market making-related related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(vi) Identifying the profile of particular trading activities of the covered banking entity, and the individual trading units of the banking entity, to help establish the appropriate frequency and scope of examination by [Agency] of such activities; and

(vii) Assessing and addressing the risks associated with the covered banking entity's covered trading activities.

The quantitative measurements that must be furnished pursuant to this appendix are *not* intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

In addition to the quantitative measurements required in this appendix, a covered banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by § __.20 and appendix C to this part. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading unit, including types of instruments traded, trading activities and strategies, and history and experience (e.g., whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, covered banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the covered banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

On an ongoing basis, covered banking entities should carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§ __.4 through __.6 that result in a material exposure to high-risk assets or high-risk trading strategies, should be escalated within the banking entity for review, further analysis, explanation to [Agency], and

remediation, where appropriate. Many of the quantitative measurements discussed in this appendix will also be helpful to covered banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§ __.2 and __.3. In addition, for purposes of this appendix, the following definitions apply:

Covered trading activity means proprietary trading, as defined in paragraph (b)(1) of § __.3.

Trading unit means each of the following units of organization of a covered banking entity:

(i) Each discrete unit that is engaged in the coordinated implementation of a revenue-generation strategy and that participates in the execution of any covered trading activity; [1]

(ii) Each organizational unit that is used to structure and control the aggregate risk-taking activities and employees of one or more trading units described in paragraph (i); [2]

(iii) All trading operations, collectively; and

(iv) Any other unit of organization specified by [Agency] with respect to a particular banking entity.

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

III. Reporting and Recordkeeping of Quantitative Measurements

A. Scope of Required Reporting

General scope. The quantitative measurements that must be furnished by a covered banking entity depend on the aggregate size of the covered banking entity's trading activities and the activities in which its trading units engage, as follows:

(i) With respect to any covered banking entity that is engaged in any covered trading activity, and has trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $5 billion:

(a) Each trading unit of the covered banking entity that is engaged in market making-related activities subject to § __.4(b) must furnish the following quantitative measurements, calculated in accordance with this appendix:

- Value-at-Risk and Stress VaR;
- VaR Exceedance;
- Risk Factor Sensitivities;
- Risk and Position Limits;
- Comprehensive Profit and Loss;
- Portfolio Profit and Loss;
- Fee Income and Expense;
- Spread Profit and Loss;
- Comprehensive Profit and Loss Attribution;
- Pay-to-Receive Spread Ratio;
- Unprofitable Trading Days Based on Comprehensive Profit and Loss and Unprofitable Trading Days Based on Portfolio Profit and Loss;
- Skewness of Portfolio Profit and Loss and Kurtosis of Portfolio Profit and Loss;
- Volatility of Comprehensive Profit and Loss and Volatility of Portfolio Profit and Loss;
- Comprehensive Profit and Loss to Volatility Ratio and Portfolio Profit and Loss to Volatility Ratio;
- Inventory Risk Turnover;
- Inventory Aging; and
- Customer-facing Trade Ratio; and

(b) Each trading unit of the covered banking entity that is engaged in permitted trading activity subject to §§ __.4(a), __.5, or __.6(a) must furnish the following quantitative measurements, calculated in accordance with this appendix:

- Value-at-Risk and Stress VaR;
- Risk Factor Sensitivities;
- Risk and Position Limits;
- Comprehensive Profit and Loss; and
- Comprehensive Profit and Loss Attribution; and

(ii) With respect to any covered banking entity that is engaged in any covered trading activity, and has trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last day of each of the four prior calendar quarters, equal to or greater than $1 billion and less than $5 billion, each trading unit of the covered banking entity that is engaged in market making-related activities under § __.4(b) must furnish the following quantitative measurement, calculated in accordance with this appendix:

- Comprehensive Profit and Loss;
- Portfolio Profit and Loss;
- Fee Income and Expense;
- Spread Profit and Loss;
- Value-at-Risk;
- Comprehensive Profit and Loss Attribution;
- Volatility of Comprehensive Profit and Loss and Volatility of Portfolio Profit and Loss; and
- Comprehensive Profit and Loss to Volatility Ratio and Portfolio Profit and Loss to Volatility Ratio.

B. Frequency of Required Calculation and Reporting

A covered banking entity must calculate any applicable quantitative measurement for each trading day. A covered banking entity must report each applicable quantitative measurement to [Agency] on a monthly basis, or on any other reporting schedule requested by [Agency]. All quantitative measurements for any calendar month must be reported to [Agency] no later than 30 days after the end of that calendar month or on any other time basis requested by [Agency].[3]

C. Recordkeeping

A covered banking entity must, for any quantitative measurement furnished to [Agency] pursuant to this appendix and § __.7, create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit [Agency] to verify the accuracy of such reports, for a period of 5 years.

IV. Quantitative Measurements

A. Risk-Management Measurements

1. Value-at-Risk and Stress Value-at-Risk

Description: For purposes of this appendix, Value-at-Risk (''VaR'') is the commonly used percentile measurement of the risk of future financial loss in the value of a given portfolio over a specified period of time, based on current market conditions. For purposes of this appendix, Stress Value-at-Risk (''Stress VaR'') is the percentile measurement of the risk of future financial loss in the value of a given portfolio over a specified period of time, based on market conditions during a period of significant financial stress.

General Calculation Guidance: Banking entities should compute and report VaR and Stress VaR by employing generally accepted standards and methods of calculation. VaR should reflect a loss in a trading unit that is expected to be exceeded less than one percent of the time over a one-day period. For those banking entities that are subject to regulatory capital requirements imposed by a Federal banking agency, VaR and Stress VaR should be computed and reported in a manner that is consistent with such regulatory capital requirements. In cases where a trading unit does not have a standalone VaR or Stress VaR calculation but is part of a larger portfolio for which a VaR or Stress VaR calculation is performed, a VaR or Stress VaR calculation that includes only the trading unit's holdings should be performed consistent with the VaR or Stress VaR model and methodology used by the larger portfolio.

Calculation Period: One trading day.

2. VaR Exceedance

Description: For purposes of this appendix, VaR Exceedance is the difference between VaR and Portfolio Profit and Loss, exclusive of Spread Profit and Loss, for a trading unit for any given calculation period.

Calculation Period: One trading day.

3. Risk Factor Sensitivities

Description: For purposes of this appendix, Risk Factor Sensitivities are changes in a trading unit's Portfolio Profit and Loss, exclusive of Spread Profit and Loss, that are expected to occur in the event of a change in a trading unit's ''risk factors'' (i.e., one or more underlying market variables that are

[1] [The Agency] expects that this will generally be the smallest unit of organization used by the covered banking entity to structure and control its risk-taking activities and employees, and will include each unit generally understood to be a single ''trading desk.''

[2] [The Agency] expects that this will generally include management or reporting divisions, groups, sub-groups, or other intermediate units of organization used by the covered banking entity to manage one or more discrete trading units (e.g., ''North American Credit Trading,'' ''Global Credit Trading,'' etc.).

[3] For example, under section IV.B.1 of this appendix, a banking entity is required to report to [Agency] the Comprehensive Profit and Loss quantitative measurement, as calculated for all trading days in June of any year, no later than July 30 of that year.

significant sources of the trading unit's profitability and risk).

General Calculation Guidance: A covered banking entity should report the Risk Factor Sensitivities that are monitored and managed as part of the trading unit's overall risk management policy. The underlying data and methods used to compute a trading unit's Risk Factor Sensitivities should depend on the specific function of the trading unit and the internal risk management models employed. The number and type of Risk Factor Sensitivities that are monitored and managed by a trading unit, and furnished to [Agency], should depend on the explicit risks assumed by the trading unit. In general, however, reported Risk Factor Sensitivities should be sufficient to account for a preponderance of the price variation in the trading unit's holdings.

Trading units should take into account any relevant factors in calculating Risk Factor Sensitivities, including, for example, the following with respect to particular asset classes:

- *Commodity derivative positions:* sensitivities with respect to the related commodity type (e.g., precious metals, oil and petroleum or agricultural products), the maturity of the positions, volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Credit positions:* sensitivities with respect to credit spread factors that are sufficiently granular to account for specific credit sectors and market segments, the maturity profile of the positions, and sensitivities to interest rates at all relevant maturities;
- *Credit-related derivative positions:* credit positions sensitivities and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Equity positions:* sensitivity to equity prices and sensitivities that differentiate between important equity market sectors and segments, such as a small capitalization equities and international equities;
- *Equity derivative positions:* equity position sensitivities and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Foreign exchange derivative positions:* sensitivities with respect to major currency pairs and maturities, sensitivity to interest rates at relevant maturities, and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), as well as the maturity profile of the positions; and
- *Interest rate positions, including interest rate derivative positions:* sensitivities with respect to major interest rate categories and maturities and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), as well as the maturity profile of the positions.

The methods used by a covered banking entity to calculate sensitivities to a common factor shared by multiple trading units, such as an equity price factor, should be applied consistently across its trading units so that the sensitivities can be compared from one trading unit to another.

Calculation Period: One trading day.

4. Risk and Position Limits

Description: For purposes of this appendix, Risk and Position Limits are the constraints that define the amount of risk that a trading unit is permitted to take at a point in time, as defined by the covered banking entity for a specific trading unit.

General Calculation Guidance: Risk and Position Limits should be reported in the format used by the covered banking entity for the purposes of risk management of each trading unit. Risk and Position Limits are often expressed in terms of risk measures, such as VaR and Risk Factor Sensitivities, but may also be expressed in terms of other observable criteria, such as net open positions. When criteria other than VaR or Risk Factor Sensitivities are used to define the Risk and Position Limits, both the value of the Risk and Position Limits and the value of the variables used to assess whether these limits have been reached should be reported.

Calculation Period: One trading day.

B. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss

Description: For purposes of this appendix, Comprehensive Profit and Loss is the net profit or loss of a trading unit's material sources of trading revenue, including, for example, dividend and interest income and expense, over a specific period of time. A trading unit's Comprehensive Profit and Loss for any given calculation period should generally equal the sum of the trading unit's (i) Portfolio Profit and Loss and (ii) Fee Income.

General Calculation Guidance: Comprehensive Profit and Loss generally should be computed using data on the value of a trading unit's underlying holdings, the prices at which those holdings were bought and sold, and the value of any fees, commissions, sales credits, spreads, dividends, interest income and expense, or other sources of income from trading activities, whether realized or unrealized. Comprehensive Profit and Loss should not include: (i) compensation costs or other costs required to operate the unit, such as information technology costs; or (ii) charges and adjustments made for internal reporting and management purposes, such as accounting reserves.

Calculation Period: One trading day.

2. Portfolio Profit and Loss

Description: For purposes of this appendix, Portfolio Profit and Loss is a trading unit's net profit or loss on its underlying holdings over a specific period of time, whether realized or unrealized. Portfolio Profit and Loss should generally include any increase or decrease in the market value of a trading unit's holdings, including, for example, any dividend, interest income, or expense of a trading unit's holdings. Portfolio Profit and Loss should not include direct fees, commissions, sales credits, or other sources of trading revenue that are not directly related to the market value of the trading unit's holdings.

General Calculation Guidance: In general, Portfolio Profit and Loss should be computed using data on a trading unit's underlying holdings and the prices at which those holdings are marked for valuation purposes. Portfolio Profit and Loss should not include: compensation costs or other costs required to operate the trading unit, such as information technology costs; or charges and adjustments made for internal reporting and management purposes, such as accounting reserves.

Calculation Period: One trading day.

3. Fee Income and Expense

Description: For purposes of this appendix, Fee Income and Expense generally includes direct fees, commissions and other distinct income for services provided by or to a trading unit over a specific period of time.

General Calculation Guidance: Fee Income and Expense should be computed using data on direct fees that are earned by the trading unit for services it provides to clients, customers, or counterparties, such as fees earned for structured transactions or sales commissions and credits earned for fulfilling a customer request, whether realized or unrealized, and similar fees paid by the trading unit to other service providers.

Calculation Period: One trading day.

4. Spread Profit and Loss

Description: For purposes of this appendix, Spread Profit and Loss is the portion of Portfolio Profit and Loss that generally includes revenue generated by a trading unit from charging higher prices to buyers than the trading unit pays to sellers of comparable instruments over the same period of time (i.e., charging a ''spread,'' such as the bid-ask spread).

General Calculation Guidance: Spread Profit and Loss generally should be computed using data on the prices at which comparable instruments are either bought or sold by the trading unit, as well as the turnover of these instruments. Spread Profit and Loss should be measured with respect to both the purchase and the sale of any position, and should include both (i) the spreads that are earned by the trading unit to execute transactions (expressed as positive amounts), and (ii) the spreads that are paid by the trading unit to initiate transactions (expressed as negative amounts). Spread Profit and Loss should be computed by calculating the difference between the bid price or the ask price (whichever is paid or received) and the mid-market price. The mid-market price is the average of bid and ask.

For some asset classes in which a trading unit is engaged in market making-related activities, bid-ask or similar spreads are widely disseminated, constantly updated, and readily available, or otherwise reasonably ascertainable. For purposes of calculating the Spread Profit and Loss attributable to a transaction in such asset classes, the trading unit should utilize the prevailing bid-ask or similar spread on the relevant position at the time the purchase or sale is completed.

For other asset classes in which a trading unit is engaged in market making-related activities, bid-ask or similar spreads may not

be widely disseminated on a consistent basis or otherwise reasonably ascertainable. A covered banking entity must identify any trading unit engaged in market making-related activities in an asset class for which the covered banking entity believes bid-ask or similar spreads are not widely disseminated on a consistent basis or are not otherwise reasonably ascertainable and must be able to demonstrate that bid-ask or similar spreads for the asset class are not reasonably ascertainable. In such cases, the trading unit should calculate the Spread Profit and Loss for the relevant purchase or sale of a position in a particular asset class by using whichever of the following three alternatives the banking entity believes more accurately reflects prevailing bid-ask or similar spreads for transactions in that asset class:

(i) End of Day Spread Proxy: A proxy based on the bid-ask or similar spread that is used to estimate, or is otherwise implied by, the market price at which the trading entity marks (or in the case of a sale, would have marked) the position for accounting purposes at the close of business on the day it executes the purchase or sale (''End of Day Spread Proxy'');

(ii) Historical Data Spread Proxy: A proxy based on historical bid-ask or similar spread data in similar market conditions (''Historical Data Spread Proxy''); or

(iii) Any other proxy that the banking entity can demonstrate accurately reflects prevailing bid-ask or similar spreads for transactions in the specific asset class.

A covered banking entity selecting any of these alternatives should be able to demonstrate that the alternative it has chosen most accurately reflects prevailing bid-ask or similar spreads for the relevant asset class. If a covered banking entity chooses to calculate Spread Profit and Loss for a particular trading unit using the End of Day Spread Proxy, then the banking entity should separately identify the portion of Spread Profit and Loss that is attributable to positions acquired and disposed of on the same trading day. If a banking entity chooses to calculate Spread Profit and Loss for a particular trading unit using the Historical Data Spread Proxy, the covered banking entity should be able to demonstrate that the Historical Data Proxy is appropriate and continually monitor market conditions and adjust, as necessary, the Historical Data Proxy to reflect any changes.

Calculation Period: One trading day.

5. Comprehensive Profit and Loss Attribution

Description: For purposes of this appendix, Comprehensive Profit and Loss Attribution is an attribution analysis that divides the trading unit's Comprehensive Profit and Loss into the separate sources of risk and revenue that have caused any observed variation in Comprehensive Profit and Loss. This attribution analysis should attribute Comprehensive Profit and Loss to specific market and risk factors that can be accurately and consistently measured over time. Any component of Comprehensive Profit and Loss that cannot be specifically identified in the attribution analysis should be identified as an unexplained portion of the Comprehensive Profit and Loss.

General Calculation Guidance: The specific market and risk factors used by a trading unit in the attribution analysis should be tailored to the trading activities undertaken by the unit. These factors should be measured consistently over time to facilitate historical comparisons. The attribution analysis should also identify any significant factors that have a consistent and regular influence on Comprehensive Profit and Loss, such as Risk Factor Sensitivities that have a significant influence on portfolio income, customer spreads, bid-ask spreads, or commissions that are earned. Factors that influence Comprehensive Profit and Loss across different trading units should be measured and included in the attribution analysis in a comparable fashion.

Calculation Period: One trading day.

C. Revenue-Relative-to-Risk Measurements

1. Volatility of Comprehensive Profit and Loss and Volatility of Portfolio Profit and Loss

Description: For purposes of this appendix, Volatility of Comprehensive Profit and Loss generally is the standard deviation of the trading unit's Comprehensive Profit and Loss estimated over a given calculation period. For purposes of this appendix, Volatility of Portfolio Profit and Loss generally is the standard deviation of the trading unit's Portfolio Profit and Loss, exclusive of Spread Profit and Loss, estimated over a given calculation period.

Calculation Period: 30 days, 60 days, and 90 days.

2. Comprehensive Profit and Loss to Volatility Ratio and Portfolio Profit and Loss to Volatility Ratio

Description: For purposes of this appendix, Comprehensive Profit and Loss to Volatility Ratio is a ratio of Comprehensive Profit and Loss to the Volatility of Comprehensive Profit and Loss for a trading unit over a given calculation period. For purposes of this appendix, Portfolio Profit and Loss to Volatility Ratio is a ratio of Portfolio Profit and Loss, exclusive of Spread Profit and Loss, to the Volatility of Portfolio Profit and Loss, exclusive of Spread Profit and Loss, for a trading unit over a given calculation period.

Calculation Period: 30 days, 60 days, and 90 days.

3. Unprofitable Trading Days Based on Comprehensive Profit and Loss and Unprofitable Trading Days Based on Portfolio Profit and Loss

Description: For purposes of this appendix, Unprofitable Trading Days Based on Comprehensive Profit and Loss is the number or proportion of trading days on which a trading unit's Comprehensive Profit and Loss is less than zero over a given calculation period. For purposes of this appendix, Unprofitable Trading Days Based on Portfolio Profit and Loss, exclusive of Spread Profit and Loss, is the number or proportion of trading days on which a trading unit's Portfolio Profit and Loss, exclusive of Spread Profit and Loss, is less than zero over a given calculation period.

Calculation Period: 30 days, 90 days, and 360 days.

4. Skewness of Portfolio Profit and Loss and Kurtosis of Portfolio Profit and Loss

Description: Skewness of Portfolio Profit and Loss and Kurtosis of Portfolio Profit and Loss should be calculated using standard statistical methods with respect to Portfolio Profit and Loss, exclusive of Spread Profit and Loss.

Calculation Period: 30 days, 60 days, and 90 days.

D. Customer-Facing Activity Measurements

1. Inventory Risk Turnover

Description: For purposes of this appendix, Inventory Risk Turnover is a ratio that measures the amount of risk associated with a trading unit's inventory, as measured by Risk Factor Sensitivities, that is turned over by the trading unit over a specific period of time. For each Risk Factor Sensitivity, the numerator of the Inventory Risk Turnover ratio generally should be the absolute value of the Risk Factor Sensitivity associated with each transaction over the calculation period. The denominator of the Inventory Risk Turnover ratio generally should be the value of each Risk Factor Sensitivity for all of the trading unit's holdings at the beginning of the calculation period.

General Calculation Guidance: As a general matter, a trading unit should measure and report the Inventory Risk Turnover ratio for each of the Risk Factor Sensitivities calculated and furnished for that trading unit.

Calculation Period: 30 days, 60 days, and 90 days.

2. Inventory Aging

Description: For purposes of this appendix, Inventory Aging generally describes the trading unit's aggregate assets and liabilities and the amount of time that those assets and liabilities have been held for the following periods: 0–30 days; 30–60 days; 60–90 days; 90–180 days; 80–360 days; and greater than 360 days. Inventory Aging should measure the age profile of the trading unit's assets and liabilities.

General Calculation Guidance: In general, Inventory Aging should be computed using a trading unit's trading activity data and should identify the trading unit's aggregate assets and liabilities. In addition, Inventory Aging should include two schedules, an asset-aging schedule and a liability-aging schedule. The asset-aging schedule should record the value of the trading unit's assets that have been held for: 0–30 days; 30–60 days; 60–90 days; 90–180 days; 180–360 days; and greater than 360 days. The liability-aging schedule should record the value of the trading unit's liabilities that have been held for: 0–30 days; 30–60 days; 60–90 days; 90–180 days; 180–360 days; and more than 360 days.

Calculation Period: 30 days, 60 days, and 90 days.

3. Customer-Facing Trade Ratio

Description: For purposes of this appendix, the Customer-Facing Trade Ratio is a ratio comparing the number of transactions involving a counterparty that is a customer of the trading unit to the number of transactions involving a counterparty that is

not a customer of the trading unit. For purposes of calculating the Customer-Facing Trade Ratio, a counterparty is considered to be a customer of the trading unit if the counterparty is neither a counterparty to a transaction executed on a designated contract market registered under the Commodity Exchange Act or national securities exchange registered under the Exchange Act, nor a broker-dealer, swap dealer, security-based swap dealer, any other entity engaged in market making-related activities, or any affiliate thereof. A broker-dealer, swap dealer, or security-based swap dealer, any other entity engaged in market making-related activities, or any affiliate thereof may be considered a customer of the trading unit for these purposes if the covered banking entity treats that entity as a customer and has documented how and why the entity is treated as such.

Calculation Period: 30 days, 60 days, and 90 days.

E. Payment of Fees, Commissions, and Spreads Measurement

1. Pay-to-Receive Spread Ratio

Description: For purposes of this appendix, the Pay-to-Receive Spread Ratio is a ratio comparing the amount of Spread Profit and Loss and Fee Income that is earned by a trading unit to the amount of Spread Profit and Loss and Fee Income that is paid by the trading unit.

General Calculation Guidance: The Pay-to-Receive Spread Ratio will depend on the amount of Spread Profit and Loss and Fee Income that is earned by the trading unit for facilitating buy and sell orders and the amount of Spread Profit and Loss that is paid by a trading unit as it initiates buy and sell orders. The Pay-to-Receive Spread Ratio generally should be computed using the calculation of Spread Profit and Loss described in this appendix, except that spread paid should include the aggregate Spread Profit and Loss of all transactions producing a negative Spread Profit and Loss, and spread received should include the aggregate Spread Profit and Loss of all transactions producing a positive Spread Profit and Loss.

Calculation Period: One trading day.

Appendix B: Commentary Regarding Identification of Permitted Market Making-Related Activities

I. Purpose

This appendix provides commentary describing the features of permitted market making-related activities and distinctions between permitted market making-related activities and prohibited proprietary trading. The appendix applies to all covered banking entities that are engaged in market making-related activities in reliance on § __.4(b). The following commentary must be incorporated into the covered banking entity's internal compliance program under § __.20, as applicable.

II. Definitions

The terms used in this appendix have the same meanings as those set forth in §§ __.2 and __.3 and Appendix A.

III. Commentary

Section 13 of the BHC Act and § __.3 prohibit any covered banking entity from engaging in proprietary trading, which is generally defined as engaging as principal for the trading account of the covered banking entity in any transaction to purchase or sell a covered financial position. However, section 13(d)(1)(B) of the BHC Act and § __.4(b) permit a covered banking entity to engage in proprietary trading that would otherwise be prohibited if the activity is conducted in connection with the covered banking entity's market making-related activities, to the extent that such activities are designed not to exceed the reasonably expected near term demands of clients, customers, and counterparties. This commentary is intended to assist covered banking entities in identifying permitted market making-related activities and distinguishing such activities from trading activities that, even if conducted in the context of the covered banking entity's market making operations, would constitute prohibited proprietary trading.

A. Overview of Market Making-Related Activities

In the context of trading activities in which a covered banking entity acts as principal, market making-related activities generally involve the covered banking entity either (i) in the case of market making in a security that is executed on an organized trading facility or exchange, passively providing liquidity by submitting resting orders that interact with the orders of others on an organized trading facility or exchange and acting as a registered market maker, where such exchange or organized trading facility provides the ability to register as a market maker,[1] or (ii) in other cases, providing an intermediation service to its customers by assuming the role of a counterparty that stands ready to buy or sell a position that the customer wishes to sell or buy. A market maker's ''customers'' generally vary depending on the asset class and market in which the market maker is providing intermediation services. In the context of market making in a security that is executed on an organized trading facility or an exchange, a ''customer'' is any person on behalf of whom a buy or sell order has been submitted by a broker-dealer or any other market participant. In the context of market making in a covered financial position in an over-the-counter market, a ''customer'' generally would be a market participant that makes use of the market maker's intermediation services, either by requesting such services or entering into a continuing relationship with the market maker with respect to such services.[2]

The primary purpose of market making-related activities is to intermediate between buyers and sellers of similar positions, for which service market makers are compensated, resulting in more liquid markets and less volatile prices. The purpose of such activities is *not* to earn profits as a result of movements in the price of positions and risks acquired or retained; rather, a market maker generally manages and limits the extent to which it is exposed to movements in the price of principal positions and risks that it acquires or retains, or in the price of one or more material elements of those positions. To the extent that it can, a market maker will eliminate some or all of the price risks to which it is exposed. However, in some cases, the risks posed by one or more positions may be sufficiently complex or specific that the risk cannot be fully hedged. In other cases, although it may be possible to hedge the risks posed by one or more positions, the cost of doing so may be so high as to effectively make market making in those positions uneconomic if complete hedges were acquired. In such cases, in order to provide effective intermediation services, market makers are required to retain at least some risk for at least some period of time with respect to price movements of retained principal positions and risks. The size and type of risk that must be retained in such cases may vary widely depending on the type and size of the positions, the liquidity of the specific market, and the market's structure. As the liquidity of positions increases, the frequency with which a market maker must take or retain risk in order to make a market in those positions generally decreases.

The profitability of market making-related activities relies on forms of revenue that reflect the value of the intermediation services that are provided to the market maker's customers. These revenues typically take the form of explicit fees and commissions or, in markets where no such fees or commission are charged, a bid-ask or similar spread that is generated by charging higher prices to buyers than is paid to sellers of comparable instruments. In the case of a derivative contract, these revenues reflect the difference between the cost of entering into the derivative contract and the cost of hedging incremental, residual risks arising from the contract. These types of ''customer revenues'' provide the primary source of a market maker's profitability. Typically, a market maker holds at least some risk with respect to price movements of retained principal positions and risks. As a result, the market maker also incurs losses or generates profits as price movements actually occur, but such losses or profits are incidental to customer revenues and significantly limited by the banking entity's hedging activities. Customer revenues, not revenues from price movements, predominate. The appropriate proportion of ''customer revenues'' to profits

[1] The status of being a registered market maker is *not,* on its own, a sufficient basis for relying on the exemption for market making-related activity contained in § __.4(b). Registration as a market maker generally involves filing a prescribed form with an exchange or organized trading facility, in accordance with its rules and procedures, and complying with the applicable requirements for market makers set forth in the rules of that exchange or organized trading facility. *See, e.g.,* Nasdaq Rule 4612, New York Stock Exchange Rule 104, CBOE Futures Exchange Rule 515, BATS Exchange Rule 11.5.

[2] In certain cases, depending on the conventions of the relevant market (e.g., the over-the-counter derivatives market), such a ''customer'' may consider itself or refer to itself more generally as a ''counterparty.''

and losses resulting from price movements of retained principal positions and risks varies depending on the type of positions involved, the typical fees, commissions, and spreads payable for transactions in those positions, and the risks of those positions. As a general matter, the proportion of ''customer revenues'' generated when making a market in certain positions increases as the fees, commissions, or spreads payable for those positions increase, the volatility of those positions' prices decrease, and the prices for those positions are less transparent.

Because a market maker's business model entails managing and limiting the extent to which it is exposed to movements in the prices of retained principal positions and risks while generating customer revenues that are earned, regardless of movements in the price of retained principal positions and risks, a market maker typically generates significant revenue relative to the risks that it retains. Accordingly, a market maker will typically demonstrate consistent profitability and low earnings volatility under normal market conditions. The appropriate extent to which a market maker will demonstrate consistent profitability and low earnings volatility varies depending on the type of positions involved, the liquidity of the positions, the price transparency of the positions, and the volatility of the positions' prices. As a general matter, consistent profitability will decrease and earnings volatility will increase as the liquidity of the positions decrease, the volatility of the positions' prices increase, and the prices for the positions are less transparent.

As the primary purpose of market making-related activities is to provide intermediation services to its customers, market makers focus their activities on servicing customer demands and typically only engage in transactions with non-customers to the extent that these transactions directly facilitate or support customer transactions. In particular, a market maker generally only transacts with non-customers to the extent necessary to hedge or otherwise manage the risks of its market making-related activities, including managing its risk with respect to movements of the price of retained principal positions and risks, to acquire positions in amounts consistent with reasonably expected near term demand of its customers, or to sell positions acquired from its customers. The appropriate proportion of a market maker's transactions that are with customers versus non-customers varies depending on the type of positions involved and the extent to which the positions are typically hedged in non-customer transactions. In the case of a derivatives market maker that engages in dynamic hedging, the number of non-customer transactions significantly outweighs the number of customer transactions, as the derivatives market maker must constantly enter into transactions to appropriately manage its retained principal positions and risks as market prices for the positions and risks move and additional transactions with customers change the risk profile of the market maker's retained principal positions.

Because a market maker generates revenues primarily by transacting with, and providing intermediation services to, customers, a market maker typically engages in transactions that earn fees, commissions, or spreads as payment for its services. Transactions in which the market maker pays fees, commissions, or spreads—i.e., where it pays another market maker for providing it with liquidity services—are much less frequent, although in some cases obtaining liquidity services from another market maker and paying fees, commissions, or spreads may be necessary to prudently manage its risk with respect to price movements of retained principal positions and risks. The appropriate proportion of a market maker's transactions that earn, rather than pay, fees, commissions or spreads varies depending on the type of positions involved, the liquidity of the positions, and the extent to which market trends increase the volatility of its risk with respect to price movements of retained principal positions and risks. As a general matter, the proportion of a market maker's transactions that earn rather than pay fees, commissions or spreads decreases as the liquidity of the positions decreases, and the extent to which the price volatility of retained principal positions and risks increases.

Finally, because the primary purpose of market making-related activities is to provide intermediation services to its customers, a market maker does not provide compensation incentives to its personnel that primarily reward proprietary risk-taking. Although a market maker may take into account revenues resulting from movements in the price of retained principal positions and risks to the extent that such revenues reflect the effectiveness with which personnel have effectively managed the risk of movements in the price of retained principal positions and risks, a market maker that provides compensation incentives relating to revenues generally does so through incentives that primarily reward customer revenues and effective customer service.

B. Overview of Prohibited Proprietary Trading Activities

Like permitted market making-related activities, prohibited proprietary trading involves the taking of principal positions by a covered banking entity. Unlike permitted market making-related activities, the purpose of prohibited proprietary trading is to generate profits as a result of, or otherwise benefit from, changes in the price of positions and risks taken. Whereas a market maker attempts to eliminate some or all of the price risks inherent in its retained principal positions and risks by hedging or otherwise managing those risks in a reasonable period of time after positions are acquired or risks arise, a proprietary trader seeks to capitalize on those risks, and generally only hedges or manages a portion of those risks when doing so would improve the potential profitability of the risk it retains. A proprietary trader does not have ''customers'' because a proprietary trader simply seeks to obtain the best price and execution in purchasing or selling its proprietary positions. A proprietary trader generates few if any fees, commissions, or spreads from its trading activities because it is not providing an intermediation service to any customer or other third party. Instead, a proprietary trader is likely to pay fees, commissions, or spreads to other market makers when obtaining their liquidity services is beneficial to execution of its trading strategy. Because a proprietary trader seeks to generate profits from changes in the price of positions taken, a proprietary trader typically provides compensation incentives to its personnel that primarily reward successful proprietary risk taking.

C. Distinguishing Permitted Market Making-Related Activities From Prohibited Proprietary Trading

Because both permitted market making-related activities and prohibited proprietary trading involve the taking of principal positions, certain challenges arise in distinguishing permitted market making-related activities and prohibited proprietary trading, particularly in cases where both of these activities occur in the context of a market making operation. Particularly during periods of significant market disruption, it may be difficult to distinguish between retained principal positions and risks that appropriately support market making-related activities and positions taken, or positions or risks not hedged, for proprietary purposes.

In connection with these challenges, [Agency] will apply the following factors in distinguishing permitted market making-related activities from trading activities that, even if conducted in the context of the covered banking entity's market making operations, would constitute prohibited proprietary trading. The particular types of trading activity described in this appendix may involve the aggregate trading activities of a single trading unit, a significant number or series of transactions occurring at one or more trading units, or a single significant transaction, among other potential scenarios. In addition to meeting the terms of this appendix, any transaction or activity for which a covered banking entity intends to rely on the market making exemption in § __.4(b) must also satisfy all the requirements specified in § __.4(b), as well as the other applicable requirements and conditions of this part.

1. Risk Management

Absent explanatory facts and circumstances, particular trading activity in which a trading unit retains risk in excess of the size and type required to provide intermediation services to customers will be considered to be prohibited proprietary trading, and not permitted market making-related activity.

[The Agency] will base a determination of whether a trading unit retains risk in excess of the size and type required for these purposes on all available facts and circumstances, including a comparison of retained principal risk to: The amount of risk that is generally required to execute a particular market making function; hedging options that are available in the market and permissible under the covered banking entity's hedging policy at the time the particular trading activity occurred; the trading unit's prior levels of retained risk and its hedging practices with respect to similar

positions; and the levels of retained risk and the hedging practices of other trading units with respect to similar positions.

To help assess the extent to which a trading unit's risks are potentially being retained in excess of amounts required to provide intermediation services to customers, [Agency] will utilize the VaR and Stress VaR, VaR Exceedance, and Risk Factor Sensitivities quantitative measurements, as applicable, among other risk measurements described in appendix A to this part and any other relevant factor. This assessment will focus primarily on the risk measurements relative to: The risk required for conducting market making-related activities, and any significant changes in the risk over time and across similarly situated trading units and banking entities.

Explanatory facts and circumstances might include, among other things, market-wide changes in risk, changes in the specific composition of market making-related activities, temporary market disruptions, or other market changes that result in previously used hedging or other risk management techniques no longer being possible or cost-effective.

2. Source of Revenues

Absent explanatory facts and circumstances, particular trading activity in which a trading unit primarily generates revenues from price movements of retained principal positions and risks, rather than customer revenues, will be considered to be prohibited proprietary trading, and not permitted market making-related activity.

[The Agency] will base a determination of whether a trading activity primarily generates revenues from price movements of retained principal positions and risks, rather than customer revenues, on all available facts and circumstances, including: an evaluation of the revenues derived from price movements of retained principal positions and risks relative to its customer revenues; and a comparison of these revenue figures to the trading unit's prior revenues with respect to similar positions, and the revenues of other covered banking entities' trading units with respect to similar positions.

To help assess the extent to which a trading unit's revenues are potentially derived from movements in the price of retained principal positions and risks, [Agency] will utilize the Comprehensive Profit and Loss, Portfolio Profit and Loss, Fee Income and Expense, and Spread Profit and Loss quantitative measurements, as applicable, both individually and in combination with one another (e.g., by comparing the ratio of Spread Profit and Loss to Portfolio Profit and Loss), and any other relevant factor.

Explanatory facts and circumstances might include, among other things: general upward or downward price trends in the broader markets in which the trading unit is making a market, provided revenues from price movements in retained principal positions and risks are consistent; sudden market disruptions or other changes causing significant, unanticipated alterations in the price of retained principal positions and risks; sudden and/or temporary changes in the market (e.g., narrowing of bid/ask spreads) that cause significant, unanticipated reductions in customer revenues; or efforts to expand or contract a trading unit's market share.

3. Revenues Relative to Risk

Absent explanatory facts and circumstances, particular trading activity will be considered to be prohibited proprietary trading, and not permitted market making-related activity, if the trading unit: generates only very small or very large amounts of revenue per unit of risk taken; does not demonstrate consistent profitability; or demonstrates high earnings volatility.

[The Agency] will base such a determination on all available facts and circumstances, including: an evaluation of the amount of revenue per unit of risk taken, earnings volatility, profitability, exposure to risks, and overall level of risk taking for the particular trading activities; and a comparison of these figures to the trading unit's prior results with respect to similar positions, and the results of other covered banking entities' trading units with respect to similar positions.

To help assess the riskiness of revenues and the amount of revenue per unit of risk taken, [Agency] will utilize the Volatility of Comprehensive Profit and Loss and Volatility of Portfolio Profit and Loss, Comprehensive Profit and Loss to Volatility Ratio and Portfolio Profit and Loss to Volatility Ratio, and Comprehensive Profit and Loss Attribution quantitative measurements, as applicable, and any other relevant factor.

To help assess the extent to which a trading unit demonstrates consistent profitability, [Agency] will utilize the Unprofitable Trading Days Based on Comprehensive Profit and Loss and Unprofitable Trading Days Based on Portfolio Profit and Loss quantitative measurements, as applicable, and any other relevant factor.

To help assess the extent to which a trading unit is exposed to outsized risk, [Agency] will utilize the Skewness of Portfolio Profit and Loss and Kurtosis of Profit and Loss quantitative measurements, as applicable, and any other relevant factor.

Explanatory facts and circumstances might include, among other things: market disruptions or other changes causing significant, unanticipated increases in a trading unit's risk with respect to movements in the price of retained principal positions and risks; market disruptions or other changes causing significant, unanticipated increases in the volatility of positions in which the trading unit makes a market; sudden and/or temporary changes in the market (e.g., narrowing of bid-ask spreads) that cause significant, unanticipated reductions in customer revenues and decrease overall profitability; or efforts to expand or contract a trading unit's market share.

4. Customer-Facing Activity

Absent explanatory facts and circumstances, particular trading activity will be considered to be prohibited proprietary trading, and not permitted market making-related activity, if the trading unit: does not transact through a trading system that interacts with orders of others or primarily with customers of the banking entity's market making desk to provide liquidity services; or retains principal positions and risks in excess of reasonably expected near term customer demands.

[The Agency] will base such a determination on all available facts and circumstances, including, among other things: An evaluation of the extent to which a trading unit's transactions are with customers versus non-customers and the frequency with which the trading unit's retained principal positions and risks turn over; and a comparison of these figures to the trading unit's prior results with respect to similar positions and market situations, and the results of other covered banking entities' trading units with respect to similar positions.

To help assess the extent to which a trading unit's transactions are with customers versus non-customers, [Agency] will utilize the Customer-Facing Trade Ratio quantitative measurement, as applicable, and any other relevant factor. To help assess the frequency with which the trading unit's retained principal positions and risks turn over, [Agency] will utilize the Inventory Risk Turnover and Inventory Aging quantitative measurements, as applicable, and any other relevant factor.

With respect to a particular trading activity in which a trading unit either does not transact through a trading system that interacts with orders of others or primarily with customers of the banking entity's market making desk to provide liquidity services, explanatory facts and circumstances might include, among other things: sudden market disruptions or other changes causing significant increases in a trading unit's hedging transactions with non-customers; or substantial intermediary trading required to satisfy customer demands and hedging management. With respect to particular trading activity in which a trading unit retains principal positions and risks in excess of reasonably expected near term customer demands, explanatory facts and circumstances might include, among other things: sudden market disruptions or other changes causing a significant reduction in actual customer demand relative to expected customer demand; documented and reasonable expectations for temporary increases in customer demand in the near term; and sudden market disruptions or other changes causing a significant reduction in the value of retained principal positions and risks, such that it would be imprudent for the trading unit to dispose of the positions in the near term.

5. Payment of Fees, Commissions, and Spreads

Absent explanatory facts and circumstances, particular trading activity in which a trading unit routinely pays rather than earns fees, commissions, or spreads will be considered to be prohibited proprietary trading, and not permitted market making-related activity.

[The Agency] will base such a determination on all available facts and circumstances, including, among other things: An evaluation of the frequency with which the trading unit pay fees,

commissions, or spreads and the relative amount of fees, commissions, or spreads that is paid versus earned; and a comparison of these figures to the trading unit's prior results with respect to similar positions, and the results of other covered banking entities' trading units with respect to similar positions.

To help assess the extent to which a trading unit is paying versus earning fees, commissions, and spreads, [Agency] will utilize the Pay-to-Receive Spread Ratio quantitative measurement, as applicable, and any other relevant factor.

Explanatory facts and circumstances might include, among other things, sudden market disruptions or other changes causing significant, increases in a trading unit's hedging transactions with non-customers for which it must pay fees, commissions, or spreads, sudden, unanticipated customer demand for liquidity that requires the trading unit itself to pay fees, commissions, or spreads to other market makers for liquidity services to obtain the inventory needed to meet that customer demand, or significant, unanticipated reductions in fees, commissions, or spreads earned by the trading unit. Explanatory facts and circumstances might also include a trading unit's efforts to expand or contract its market share.

6. Compensation Incentives

Absent explanatory facts and circumstances, the trading activity of a trading unit that provides compensation incentives to employees that primarily reward proprietary risk taking will be considered to be prohibited proprietary trading, and not permitted market making-related activity.

[The Agency] will base such a determination on all available facts and circumstances, including, among other things, an evaluation of: the extent to which compensation incentives are provided to trading unit personnel that reward revenues from movements in the price of retained principal positions and risks; the extent to which compensation incentives are provided to trading unit personnel that reward customer revenues; and the compensation incentives provided by other covered banking entities to similarly-situated personnel.

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Appendix C: Minimum Standards for Programmatic Compliance

I. Overview

A. Purpose

This appendix sets forth the minimum standards with respect to the establishment, maintenance, and enforcement by banking entities of internal compliance programs for ensuring and monitoring compliance with the prohibitions and restrictions on proprietary trading and covered fund activities or investments set forth in section 13 of the BHC Act and this part.

This appendix requires that banking entities establish, maintain, and enforce an effective compliance program, consisting of written policies and procedures, internal controls, a management framework, independent testing, training, and recordkeeping, that:

- Is reasonably designed to clearly document, describe, and monitor the covered trading and covered fund activities or investments and the risks of the covered banking entity related to such activities or investments, identify potential areas of noncompliance, and prevent activities or investments prohibited by, or that do not comply with, section 13 of the BHC Act and this part;
- Specifically addresses the varying nature of activities or investments conducted by different units of the covered banking entity's organization, including the size, scope, complexity, and risks of the individual activities or investments;
- Subjects the effectiveness of the compliance program to independent review and testing;
- Makes senior management and intermediate managers accountable for the effective implementation of the compliance program, and ensures that the board of directors and CEO review the effectiveness of the compliance program; and
- Facilitates supervision and examination of the covered banking entity's covered trading and covered fund activities or investments by the Agencies.

B. Definitions

The terms used in this Appendix have the same meanings as set forth in §§ __.2, __.3, and __.10. In addition, for purposes of this appendix, the following definitions apply:

Asset management unit means any unit of organization of a covered banking entity that makes investments in, or acts as sponsor to, covered funds, or has relationships with covered funds, that the covered banking entity (or an affiliate of subsidiary thereof) has sponsored, organized and offered, or in which a covered fund sponsored or advised by the covered banking entity invests.

Compliance program means the internal compliance program established by a covered banking entity in accordance with § __.20 and this appendix.

Covered fund activity or investment means sponsoring any covered fund or making investments in, or otherwise having relationships with, any covered fund for which the covered banking entity (or an affiliate or subsidiary thereof) acts as sponsor or organizes and offers.

Covered fund restrictions means the restrictions on covered fund activities or investments set forth in subpart C.

Covered trading activity means proprietary trading, as defined in § __.3(b)(1).

Trading unit means each of the following units of organization of a covered banking entity:

(i) Each discrete unit that is engaged in the coordinated implementation of a revenue-generation strategy and that participates in the execution of any covered trading activity; [1]

(ii) Each organizational unit that is used to structure and control the aggregate risk-taking activities and employees of one or more trading units described in paragraph (i); [2]

(iii) All trading operations, collectively; and

(iv) Any other unit of organization specified by [Agency] with respect to a particular banking entity.

C. Required Elements

Section __.20 requires that covered banking entities establish, maintain, and enforce a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities or investments that effectively implements, at a minimum, the six elements required under paragraph (b) of § __.20.

D. Compliance Program Structure

Each covered banking entity subject to § __.20(c) must be governed by a compliance program meeting the requirements of this appendix. A covered banking entity may establish a compliance program on an enterprise-wide basis to satisfy the requirements of § __.20 and this appendix with respect to the covered banking entity and all of its affiliates and subsidiaries collectively, provided that: the program is clearly applicable, both by its terms and in operation, to all such affiliates and subsidiaries; the program specifically addresses the requirements set forth in this appendix; the program takes into account and addresses the consolidated organization's business structure, size, and complexity, as well as the particular activities, risks, and applicable legal requirements of each subsidiary and affiliate; and the program is determined through periodic independent testing to be effective for the covered banking entity and all of its subsidiaries and affiliates. An enterprise-wide program established pursuant to this Appendix will be subject to supervisory review and examination by any Agency vested with rulewriting authority under section 13 of the BHC Act with respect to the compliance program and the activities or investments of any banking entity for which the Agency has such authority. Further, such Agency will have access to all records related to the enterprise-wide compliance program pertaining to any banking entity that is supervised by the Agency vested with such rulewriting authority.

E. Applicability

This appendix applies only to covered banking entities described in § __.20(c)(2). In addition, [Agency] may require any covered banking entity to comply with all or portions of this appendix if [Agency] deems it appropriate for purposes the covered banking entity's compliance with this part.

[1] [The Agency] expects that this will generally be the smallest unit of organization used by the covered banking entity to structure and control its risk-taking activities and employees, and will include each unit generally understood to be a single ''trading desk.''

[2] [The Agency] expects that this will generally include management or reporting divisions, groups, sub-groups, or other intermediate units of organization used by the covered banking entity to manage one or more discrete trading units (e.g., ''North American Credit Trading,'' ''Global Credit Trading,'' etc.).

Nothing in this appendix limits the authority of [Agency] under any other provision of law or regulation to take supervisory, examination, or enforcement action, including action to address unsafe or unsound practices or conditions, deficient capital levels, or violations of law.

II. Internal Policies and Procedures

A. Covered Trading Activities

A covered banking entity must establish, maintain, and enforce written policies and procedures reasonably designed to document, describe, and monitor the covered banking entity's covered trading activities and the risks taken in these activities, as follows:[3]

Identification of trading account: The covered banking entity's policies and procedures must specify how the banking entity evaluates the covered financial positions it acquires or takes and determines which of its accounts are trading accounts for purposes of subpart B of this part.

Identification of trading units and organization structure: The covered banking entity's written policies and procedures must identify and document each trading unit within the organization and map each trading unit to the division, business line, or other organizational structure that the covered banking entity uses to manage or oversee the trading unit's activities.

Description of missions and strategies: The covered banking entity's written policies and procedures for each trading unit must clearly articulate and document a comprehensive description of the mission (i.e., the nature of the business conducted) and strategy (i.e., business model for the generation of revenues) of the trading unit, and include a description of:

- How revenues are intended to be generated by the trading unit;
- The activities that the trading unit is authorized to conduct, including (i) authorized instruments and products and (ii) authorized hedging strategies and instruments;
- The expected holding period of, and the market risk associated with, covered financial positions in its trading account;
- The types of clients, customers, and counterparties with whom trading is conducted by the trading unit;
- How the trading unit, if engaged in market making-related activity under § __.4(b) of this part, identifies its customers for purposes of computing the Customer-Facing Trade Ratio, if applicable, including documentation explaining when, how, and why a broker-dealer, swap dealer, security-based swap dealer, any other entity engaged in market making-related activities, or any affiliate thereof is considered to be a customer of the trading unit for those purposes; and
- The compensation structure of the employees associated with the trading unit.

Trader mandates: The covered banking entity must establish, maintain, document, and enforce trader mandates for each trading unit. At a minimum, trader mandates must:

- Clearly inform each trader of the prohibitions and requirements set forth in section 13 of the BHC Act and this part and his or her responsibilities for compliance with such requirements;
- Set forth appropriate parameters for each trader engaged in covered trading activities, including:
  - The conditions for relying on the applicable exemptions in §§ __.4 through __.6;
  - The financial contracts, products, and underlying assets that the trader is permitted to trade pursuant to the covered banking entity's internal controls;
  - The risk limits of the trader's trading unit, and the types and levels of risk that may be taken; and
  - The applicable trading unit's hedging policy.

Description of risks and risk management processes: The written policies and procedures for each trading unit must clearly articulate and document a comprehensive description of the risks associated with the trading unit. Such descriptions must include, at a minimum, the following elements:

- A description of the supervisory and risk management structure governing the trading units, including a description of processes for initial and senior-level review of new products and new strategies;
- A description of the types of risks that may be taken to implement the mission and strategy of the trading unit, including an enumeration of material risks resulting from the activities in which the trading unit is engaged (including but not limited to all significant price risks, such as basis, volatility and correlation risks, as well as any significant counterparty credit risk associated with the trading activity);
- An articulation of the amount of risk allocated by the covered banking entity to such trading unit to implement the documented mission and strategy of the trading unit;
- An explanation of how the risks allocated to such trading unit will be measured; and
- An explanation of why the allocated risk levels are appropriate to the mission and strategy of the trading unit.

Hedging policies and procedures. The covered banking entity must establish, maintain, and enforce policies and procedures for all of its trading units regarding the use of risk-mitigating hedging instruments and strategies. At a minimum, these hedging policies and procedures must articulate the following:

- The manner in which the covered banking entity will determine that the risks generated by each trading unit have been properly and effectively hedged;
- The instruments, techniques and strategies the covered entity will use to hedge the risk of the positions or portfolios;
- The level of the organization at which hedging activity and management will occur;
- The manner in which hedging strategies will be monitored;
- The risk management processes used to control unhedged or residual risks; and
- The independent testing of hedging techniques and strategies.

Explanation of compliance. The covered banking entity's written policies and procedures must clearly articulate and document a comprehensive explanation of how the mission and strategy of each trading unit, and its related risk levels, comply with this part. Such explanation must:

- Identify which portions of the risk-taking activity of the trading unit would or would not constitute covered trading activity;
- Identify activities of the trading unit that will be conducted in reliance on exemptions contained in §§ __.4 through __.6, including an explanation of:
  - o How and where the activity occurs; and
  - o Which exemption is being relied on and how the activity meets the specific requirements for reliance on the applicable exemption.
- Describe how the covered banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by each trading unit, which must take into account potential or actual exposure to:
  - Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;
  - Assets whose changes in values cannot be adequately mitigated by effective hedging;
  - New products with rapid growth, including those that do not have a market history;
  - Assets or strategies that include significant embedded leverage;
  - Assets or strategies that have demonstrated significant historical volatility;
  - Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and
  - Assets or strategies that result in large and significant concentrations to sectors, risk factors, or counterparties;
- Explain how each trading unit will comply with the reporting and recordkeeping requirements of § __.7 and Appendix A ;
- Describe how the covered banking entity monitors for and prohibits potential or actual material conflicts of interest between the covered banking entity and its clients, customers, or counterparties present in each trading unit; and
- Describe how the covered banking entity monitors for and prohibits potential or actual transactions or activities that may threaten the safety and soundness of the covered banking entity.

Remediation of violations. The covered banking entity's written policies and procedures must require the covered banking entity to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, and document all proposed and actual remediation efforts. Further, such policies and procedures must include specific procedures that are reasonably designed to implement and monitor any required remediation and that assess the extent to which any violation indicates that modification to the covered banking entity's compliance program is warranted.

[3] These policies and procedures must be updated with a frequency sufficient for the covered banking entity to adequately control the applicable trading unit for purposes of this part.

With respect to any trading unit that is either used by the covered banking entity to structure and control the aggregate risk-taking activities and employees of one or more other trading units, or comprised of the entire trading operation of the covered banking entity, the description of missions and strategies, description of risks and risk management processes, and explanation of compliance for such trading units may incorporate by reference the policies and procedures of the underlying trading units that the trading unit oversees and manages in the aggregate.

B. Covered Fund Activities or Investments

A covered banking entity must establish, maintain, and enforce written policies and procedures that are reasonably designed to document, describe, and monitor the covered banking entity's covered fund activities or investments and the risks taken in these activities or investments, as follows.

Identification of covered funds: The covered banking entity's policies and procedures must specify how the covered banking entity identifies covered funds that the covered banking entity sponsors, organizes and offers, or in which covered banking entity invests.

Identification of asset management units and organization structure: The covered banking entity's written policies and procedures must identify and document each asset management unit within the organization and map each asset management unit to the division, business line, or other organizational structure that the covered banking entity uses to manage or oversee the asset management unit's activities or investments.

Description of sponsorship activities related to covered funds: The covered banking entity's written policies and procedures for each asset management unit must clearly articulate and document a comprehensive description of the mission (i.e., the nature of the business conducted) and strategy (i.e., business model for the generation of revenues) of the asset management unit related to its sponsorship or organizing and offering of covered funds, including a description of how such activities comply with this part and, in particular:

- The activities that the asset management unit is authorized to conduct, including the nature of any trust, fiduciary, investment advisory, or commodity trading advisory services offered to customers of the covered banking entity;
- The types of customers to whom the asset management unit provides such services and to whom ownership interests in covered funds are sold;
- The extent of any co-investment activities of the covered banking entity (including its directors or employees) in covered funds offered to such customers; and
- How the asset management unit complies with the requirements of subpart C of this part.

Description of investment activities of covered funds: The covered banking entity's written policies and procedures for each asset management unit must clearly articulate and document a comprehensive description of the mission (i.e., the nature of the business conducted) and strategy (i.e., business model for the generation of revenues) of the asset management unit related to its investments in covered funds, including a description of how such activities comply with this part and, in particular:

- The asset management unit's practices with respect to seed capital investments in covered funds, including how the asset management unit reduces its investments in covered funds to amounts that are permitted *de minimis* investments within the required period of time;
- The asset management unit's practices with respect to co-investments in covered funds, including certain parallel investments as identified in §__.12;
- How the asset management unit complies with the requirements of §__.12 with respect to individual and aggregate investments in covered funds;
- With respect to other permitted covered fund activities or investment, how the asset management unit complies with the requirements of §§__.13 and __.14;
- How the asset management unit complies with the limitations on relationships with a covered fund under §__.16;
- How the covered banking entity monitors for and prohibits potential or actual material conflicts of interest between the covered banking entity and its clients, customers, or counterparties related to the asset management unit;
- How the covered banking entity monitors for and prohibits potential or actual transactions or activities that may threaten the safety and soundness of the covered banking entity related to the asset management unit; and
- How the covered banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by each asset management unit.

Remediation of violations. The covered banking entity's written policies and procedures must require the covered banking entity to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, and document all proposed and actual remediation efforts. Further, such policies and procedures must include specific procedures that are designed to implement, monitor, and enforce any required remediation and that assess the extent to which any violation indicates that modification to the covered banking entity's compliance program is warranted.

III. Internal Controls

A. Covered Trading Activities

A covered banking entity must establish, maintain, and enforce written internal controls that are reasonably designed to ensure that the trading activity of each trading unit is appropriate and consistent with the description of mission, strategy, and risk mitigation for each trading unit contained in its written policies and procedures. These written internal controls must also be reasonably designed and established to effectively monitor and identify for further analysis any covered trading activity that may indicate potential violations of section 13 of the BHC Act and this part and to prevent actual violations of section 13 of the BHC Act and this part. Further, the internal controls must describe procedures for remedying violations of section 13 of the BHC Act and this part. The written internal controls must include, at a minimum, the following.

Authorized risks, instruments, and products. The covered banking entity must implement and enforce internal controls for each trading unit that are reasonably designed to ensure that trading activity is conducted in conformance with the trading unit's authorized risks, instruments, and products, as documented in the covered banking entity's written policies and procedures and trader mandates. At a minimum, these internal controls must monitor and govern:

- The types and levels of risks that may be taken by each trading unit, consistent with the covered banking entity's written policies and procedures;
- The type of hedging instruments used, hedging strategies employed, and the amount of risk effectively hedged, consistent with the covered banking entity's written policies and procedures; and
- The financial contracts, products and underlying assets that the trading unit may trade, consistent with covered banking entity's written policies and procedures.

Risk limits. The covered banking entity must establish and enforce risk limits appropriate for each trading unit, which shall include limits based on probabilistic and non-probabilistic measures of potential loss (e.g., Value-at-Risk and notional exposure, respectively), measured under normal and stress market conditions.

Analysis and quantitative measurements. The covered banking entity must perform robust analysis and quantitative measurement of its covered trading activities that is reasonably designed to ensure that the trading activity of each trading unit is consistent with its mission, strategy and risk management process, as documented in the covered banking entity's written policies and procedures; monitor and assist in the identification of potential and actual prohibited proprietary trading activity; and prevent the occurrence of prohibited proprietary trading. In addition to the quantitative measurements reported by the covered banking entity to [Agency] pursuant to appendix A to this part, each covered banking must develop and implement, to the extent necessary to facilitate compliance with this part, additional quantitative measurements specifically tailored to the particular risks, practices, and strategies of its trading units. The covered banking entity's analysis and quantitative measurement must incorporate the quantitative measurements reported by the covered banking entity to [Agency] pursuant to Appendix A and include, at minimum, the following:

- Internal controls and written policies and procedures reasonably designed to ensure the accuracy and integrity of quantitative measurements;

• Ongoing, timely monitoring and review of calculated quantitative measurements;

• Heightened review of a quantitative measurement when such quantitative measurement raises any question regarding compliance with section 13 of the BHC Act and this part, which shall include in-depth analysis, appropriate escalation procedures, and documentation related to the review, including the establishment of numerical thresholds for each trading unit for purposes of triggering such heightened review; and

• Immediate review and compliance investigation of the trading unit's activities, escalation to senior management with oversight responsibilities for the applicable trading unit, timely notification to [Agency], appropriate remedial action (e.g., divesting of impermissible positions, cessation of impermissible activity, disciplinary actions), and documentation of the investigation findings and remedial action taken when the quantitative measurement, considered together with the facts and circumstances, suggests a reasonable likelihood that the trading unit has violated any part of section 13 of the BHC Act and this part.

Surveillance of compliance program effectiveness. The covered banking entity must regularly monitor the effectiveness of its compliance program and take prompt action to address and remedy any deficiencies identified. Any actions taken to remedy deficiencies and violations shall be documented and maintained as a record of the banking entity.

B. Covered Fund Activities

A covered banking entity must establish, maintain, and enforce internal controls that are reasonably designed to ensure that the covered fund activities or investments of its asset management units are appropriate and consistent with the description of the asset management unit's mission, strategy, and risk management process contained in the covered banking entity's written policies and procedures. The internal controls must, at a minimum, be designed to ensure that the covered banking entity complies with the requirements of § __.11 for any covered fund in which it invests, acts as sponsor, or organizes and offers, as well as the following:

Monitoring investments in a covered fund. The covered banking entity must implement and enforce internal controls in a way that monitors and limits the covered banking entity's individual and aggregate investments in covered funds. At a minimum, the covered banking entity shall establish, maintain, and enforce internal controls reasonably designed to ensure that such investments are in compliance with section 13 of the BHC Act and this part at all times, including:

• Monitoring the amount and timing of seed capital investments for compliance with the limitations (including but not limited to the redemption, sale or disposition requirements of § __.12);

• Calculating the individual and aggregate levels of ownership interests in covered funds required by § __.12;

• Describing procedures for remedying violations of section 13 of the BHC Act and this part;

• Attributing the appropriate instruments to the individual and aggregate ownership interest calculations above; and

• Making the appropriate required disclosures, in writing, to prospective and actual investors in any covered fund organized and offered or sponsored by the covered banking entity, as provided under § __.11(h).

Monitoring relationships with a covered fund. The covered banking entity must implement and enforce internal controls in a way that monitors and limits the covered banking entity's sponsorship of, and relationships with, covered funds. At a minimum, the covered banking entity shall establish, maintain, and enforce internal controls reasonably designed to ensure that such activities and relationships are in compliance with section 13 of the BHC Act and this part at all times, including monitoring for and preventing any relationship or transaction between the covered banking entity and a covered fund that is prohibited under § __.16.

Surveillance of compliance program effectiveness. The covered banking entity must regularly monitor the effectiveness of its compliance program and take prompt action to address and remedy any deficiencies identified. Any actions taken to remedy deficiencies and violations shall be documented and maintained as a record of the covered banking entity.

IV. Responsibility and Accountability for the Compliance Program

A covered banking entity must establish, maintain, and enforce a management framework to manage its business and employees with a view to preventing violations of section 13 of the BHC Act and this part. A covered banking entity must have an appropriate management framework reasonably designed to ensure that: appropriate personnel are made responsible and accountable for the effective implementation and enforcement of the compliance program; a clear reporting line with a chain of responsibility is delineated; and the board of directors, or similar corporate body, and CEO reviews and approves the compliance program. This management framework must include, at a minimum:

Corporate governance. The covered banking entity must ensure that its compliance program is reduced to writing, approved by the board of directors or similar corporate body, and noted in the minutes.

Trader mandates. The covered banking entity must establish, maintain, and enforce the trader mandates required by this appendix to clearly inform each trader within a trading unit of his or her responsibilities for compliance with section 13 of the BHC Act and this part.

Management procedures. The covered banking entity must establish, maintain, and enforce management procedures that are reasonably designed to achieve compliance with section 13 of the BHC Act and this part, which, at a minimum, provide for:

• The designation of at least one person with authority to carry out the management responsibilities of the covered banking entity for each trading unit;

• Written procedures addressing the management of the activities of the covered banking entity that are reasonably designed to achieve compliance with section 13 of the BHC Act and this part, including:

○ Procedures for the review by a manager of activities of the trading unit and the quantitative measurements pursuant to appendix A and any other quantitative measurements developed and tailored to the particular risks, practices, and strategies of the covered banking entity's trading units;

○ A description of the management system, including the titles, qualifications, and locations of managers and the specific responsibilities of each person with respect to the covered banking entity's trading units; and

○ Procedures for determining compensation arrangements for traders engaged in underwriting or market making-related activities under § __.4 or risk-mitigating hedging activities under § __.5 so that such compensation arrangements are designed not to reward proprietary risk taking.

Business line managers. Managers with responsibility for one or more trading units or asset management units of the covered banking entity engaged in covered trading activities or covered fund activities or investments are accountable for the effective implementation and enforcement of the compliance program with respect to the applicable trading unit or asset management unit.

Senior management. Senior management is responsible for communicating and reinforcing the culture of compliance with section 13 of the BHC Act and this part, as established by the board of directors or similar corporate body, and implementing and enforcing the approved compliance program. Senior management must also ensure that effective corrective action is taken when failures in compliance with section 13 of the BHC Act and this part are identified.[4] Senior management and control personnel charged with overseeing compliance with section 13 of the BHC Act and this part should report to the board, or an appropriate committee thereof, on the effectiveness of the compliance program and compliance matters with a frequency appropriate to the size, scope, and risk profile of the covered banking entity's covered trading activities and covered fund activities or investments, which shall be at least once every twelve months.

Board of directors, or similar corporate body, and CEO. The board of directors, or similar corporate body, and CEO are responsible for setting an appropriate culture of compliance with this part and establishing clear policies regarding the management of covered trading activities and covered fund activities or investments in compliance with section 13 of the BHC Act and this part. The board of directors or similar corporate body must ensure that senior management is fully capable, qualified, and properly motivated to manage compliance with this part in light of

[4] Such corrective action may include, among other things divesture of the position, cessation of the activity, or disciplinary measures.

the organization's business activities. The board of directors or similar corporate body must also ensure that senior management has established appropriate incentives to support compliance with this part, including the implementation of a compliance program meeting the requirements of this appendix into management goals and compensation structures across the covered banking entity.

V. Independent Testing

A covered banking entity must ensure that independent testing is conducted by a qualified independent party, such as the covered banking entity's internal audit department, outside auditors, consultants, or other qualified independent parties, regarding the effectiveness of the covered banking entity's compliance program established pursuant to this appendix and §__.20 and the covered banking entity's compliance with this part. A banking entity must take appropriate action to remedy any concerns identified by the independent testing (e.g., remedying deficiencies in its written policies and procedures and internal controls, etc.).

The required independent testing must occur with a frequency appropriate to the size, scope, and risk profile of the covered banking entity's covered trading and covered fund activities or investments, which shall be no less than once every twelve months. This independent testing must include an evaluation of:

- The overall adequacy and effectiveness of the covered banking entity's compliance program, including an analysis of the extent to which the program contains all the required elements of this appendix;
- The effectiveness of the covered banking entity's written policies and procedures;
- The effectiveness of the covered banking entity's internal controls, including an analysis and documentation of instances in which such internal controls have been breached, and how such breaches were addressed and resolved; and
- The effectiveness of the covered banking entity's management procedures.

VI. Training

Covered banking entities must provide adequate training to trading personnel and managers of the covered banking entity, as well as other appropriate personnel, as determined by the covered banking entity, in order to effectively implement and enforce the compliance program. This training should occur with a frequency appropriate to the size and the risk profile of the covered banking entity's covered trading activities and covered fund activities or investments. The training may be conducted by internal personnel or independent parties deemed appropriate by the covered banking entity based on its size and risk profile.

VII. Recordkeeping

Covered banking entities must create and retain records sufficient to demonstrate compliance and support the operations and effectiveness of the compliance program. A covered banking entity must retain these records for a period that is no less than 5 years in a form that allows it to promptly produce such records to [Agency] on request.

END OF COMMON RULE

[END OF COMMON TEXT]

Adoption of the Common Rule Text

The proposed adoption of the common rules by the agencies, as modified by agency-specific text, is set forth below:

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chapter I

List of Subjects in 12 CFR Part 44

Banks, Banking, Compensation, Credit, Derivatives, Government securities, Insurance, Investments, National banks, Penalties, Reporting and recordkeeping requirements, Risk, Risk retention, Securities, Trusts and trustees.

Authority and Issuance

For the reasons stated in the Common Preamble, the Office of the Comptroller of the Currency proposes to amend chapter I of Title 12, Code of Federal Regulations as follows:

PART 44—PROPRIETARY TRADING AND CERTAIN INTEREST IN AND RELATIONSHIPS WITH COVERED FUNDS

1. The authority citation for part 44 is added to read as follows:

Authority: 7 U.S.C. 27 *et seq.,* 12 U.S.C. 1, 24, 92a, 93a, 161, 1461, 1462a, 1463, 1464, 1813(q), 1818, 1851, 3101 3102, 3108, 5412.

2. Part 44 is added as set forth at the end of the Common Preamble.

3. Part 44 is amended by

a. Removing ''[Agency]'' wherever it appears and adding in its place ''the OCC''; and

b. Removing ''[The Agency]'' wherever it appears and adding in its place ''The OCC''.

4. Section 44.1 is added to read as follows:

§ 44.1 Authority, purpose, and scope.

(a) *Authority.* This part is issued by [Agency] under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds by certain banking entities, including national banks, Federal branches and agencies of foreign banks, Federal savings associations, and certain subsidiaries thereof. This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds, and explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to covered banking entities described in § 44.2(j). This part takes effect on July 21, 2012.

(d) *Relationship to other authorities.* Except as otherwise provided under section 13 of the Bank Holding Company Act, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of Bank Holding Company Act shall apply to the activities of a covered banking entity, even if such activities are authorized for a covered banking entity under other applicable provisions of law.

(e) *Preservation of authority.* Nothing in this part limits in any way the authority of the OCC to impose penalties for violation of this part by any covered banking entity provided under any other applicable statute.

5. Paragraph (j) of § 44.2 is added to read as follows:

§ 44.2 Definitions.

* * * * *

(j) Covered banking entity means any banking entity that is:

(1) A national bank;

(2) A Federal branch or agency of a foreign bank;

(3) A Federal savings association or a Federal savings bank; and

(4) Any subsidiary of a company described in paragraph (j)(1) through (3) of this section, other than a subsidiary for which the CFTC or SEC is the primary financial regulatory agency as defined in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

* * * * *

BOARD OF GOVERNORS OF THE FEDERAL RESERVE

12 CFR Chapter II

List of Subjects in 12 CFR Part 248

Administrative practice and procedure, Banks and banking, Capital, Compensation, Conflict of interests, Credit, Derivatives, Foreign banking, Government securities, Holding companies, Insurance, Insurance companies, Investments, Penalties, Reporting and recordkeeping requirements, Risk, Risk retention, Securities, Trusts and trustees.

Authority and Issuance

For the reasons set forth in the Supplementary Information, the Board of Governors of the Federal Reserve System proposes to add the text of the common rule as set forth at the end of the Supplementary Information as Part 248 to 12 CFR Chapter II as follows:

PART 248—PROPRIETARY TRADING AND RELATIONSHIPS WITH COVERED FUNDS (REGULATION VV)

6. The authority citation for part 248 is added to read as follows:

Authority: 12 U.S.C. 1851, 12 U.S.C. 221 *et seq.,* 12 U.S.C. 1818, 12 U.S.C. 1841 *et seq.,* and 12 U.S.C. 3103 *et seq.*

7. Part 248 is added as set forth at the end of the Common Preamble.

8. Part 248 is amended by:

A. Removing ''[Agency]'' wherever it appears and adding in its place ''the Board''; and

B. Removing ''[The Agency]'' wherever it appears and adding in its place ''The Board''.

9. Section 248.1 is added to read as follows:

§ 248.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part [1] (Regulation VV) is issued by the Board under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851), as well as under the Federal Reserve Act, as amended (12 U.S.C. 221 *et seq.*); section 8 of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1818); the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*); and the International Banking Act of 1978, as amended (12 U.S.C. 3101 *et seq.*).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds by certain banking entities, including state members banks, bank holding companies, savings and loan holding companies, other companies that control an insured depository, foreign banking organizations, and certain subsidiaries thereof. This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds, and explaining the statute's requirements.

[1] Code of Federal Regulations, title 12, chapter II, part 248.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to covered banking entities described in § 248.2(j). This part takes effect on July 21, 2012.

(d) *Relationship to other authorities.* Except as otherwise provided in under section 13 of the Bank Holding Company Act, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of Bank Holding Company Act shall apply to the activities of a covered banking entity, even if such activities are authorized for a covered banking entity under other applicable provisions of law.

10. In § 248.2, paragraph (c) is revised, and paragraph (j) is added to read as follows:

§ 248.2 Definitions.

* * * * *

(c) Nothing in this part limits in any way the authority of the Board, under the BHC Act (including section 8 of such Act) and other provisions of law, to impose penalties for violation by any company or individual.

* * * * *

(j) *Covered banking entity* means any banking entity that is:

(1) A state member bank (as defined in 12 CFR 208.2(g));

(2) A bank holding company;

(3) A savings and loan holding company (as defined in 12 U.S.C. 1467a);

(4) A foreign banking organization (as defined in 12 CFR 211.21(o));

(5) Any company that controls an insured depository institution; and

(6) Any subsidiary of a company described in paragraph (j)(1) through (5) of this section, other than a subsidiary for which the OCC, FDIC, CFTC, or SEC is the primary financial regulatory agency (as defined in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

11–12. Add subpart E to read as follows:

Subpart E—Conformance Period and Extended Transition Period Authorities

Sec.

Subpart E—Conformance Period and Extended Transition Period Authorities

§ 248.30 Definitions.

For purposes of this subpart:

(a) *Illiquid fund* means a covered fund that:

(1) As of May 1, 2010:

(i) Was principally invested in illiquid assets; or

(ii) Was invested in, and contractually committed to principally invest in, illiquid assets; and

(2) Makes all investments pursuant to, and consistent with, an investment strategy to principally invest in illiquid assets.

(b) *Illiquid assets* means any real property, security, obligation, or other asset that:

(1) Is not a liquid asset;

(2) Because of statutory or regulatory restrictions applicable to the covered fund or asset, cannot be offered, sold, or otherwise transferred by covered fund to a person that is unaffiliated with the relevant banking entity; or

(3) Because of contractual restrictions applicable to the covered fund or asset, cannot be offered, sold, or otherwise transferred by the covered fund for a period of 3 years or more to a person that is unaffiliated with the relevant banking entity.

(c) *Liquid asset* means:

(1) Cash or cash equivalents;

(2) An asset that is traded on a recognized, established exchange, trading facility or other market on which there exist independent, *bona fide* offers to buy and sell so that a price reasonably related to the last sales price or current *bona fide* competitive bid and offer quotations can be determined for the particular asset almost instantaneously;

(3) An asset for which there are *bona fide,* competitive bid and offer quotations in a recognized inter-dealer quotation system or similar system or for which multiple dealers furnish *bona fide,* competitive bid and offer quotations to other brokers and dealers on request;

(4) An asset the price of which is quoted routinely in a widely disseminated publication that is readily available to the general public or through an electronic service that provides indicative data from real-time financial networks;

(5) An asset with an initial term of one year or less and the payments on which at maturity may be settled, closed-out, or paid in cash or one or more other liquid assets described in paragraphs (c)(1), (2), (3), or (4) of this section; and

(6) Any other asset that the Board determines, based on all the facts and circumstances, is a liquid asset.

(d) *Principally invested* and related definitions.—A covered fund:

(1) Is *principally invested* in illiquid assets if at least 75 percent of the fund's consolidated total assets are—

(i) Illiquid assets; or

(ii) Risk-mitigating hedges entered into in connection with and related to individual or aggregated positions in, or holdings of, illiquid assets;

(2) Is *contractually committed to principally invest* in illiquid assets if the fund's organizational documents, other documents that constitute a contractual obligation of the fund, or written representations contained in the fund's offering materials distributed to potential investors provide for the fund to be principally invested in assets described in paragraph (d)(1) of this section at all times other than during temporary periods, such as the period prior to the initial receipt of capital contributions from investors or the period during which the fund's investments are being liquidated and capital and profits are being returned to investors; and

(3) Has an *investment strategy to principally invest* in illiquid assets if the fund:

(i) Markets or holds itself out to investors as intending to principally invest in assets described in paragraph (d)(1) of this section; or

(ii) Has a documented investment policy of principally investing in assets described in paragraph (d)(1) of this section.

§ 248.31 Conformance periods for banking entities engaged in prohibited proprietary trading or covered fund activities or investments.

(a) *Conformance Period.* (1) *In general.*—Except as provided in paragraph (a)(2) or (3) of this section, a banking entity shall bring its activities and investments into compliance with the requirements of section 13 of the BHC Act (12 U.S.C. 1851) and this part no later than 2 years after July 21, 2012.

(2) *New banking entities.*—A company that was not a banking entity, or a subsidiary or affiliate of a banking entity, as of July 21, 2010, and becomes a banking entity, or a subsidiary or affiliate of a banking entity, after that date shall bring its activities and investments into compliance with the requirements of section 13 of the BHC Act (12 U.S.C. 1851) and this part before the later of:

(i) The conformance date determined in accordance with paragraph (a)(1) of this section; or

(ii) 2 years after the date on which the company becomes a banking entity or a subsidiary or affiliate of a banking entity.

(3) *Extended conformance period.* The Board may extend the two-year period under paragraph (a) (1) or (2) of this section by not more than three separate one-year periods, if, in the judgment of the Board, each such one-year extension is consistent with the purposes of section 13 of the BHC Act (12 U.S.C. 1851) and this part and would not be detrimental to the public interest.

(b) *Illiquid funds.* (1) *Extended transition period.* The Board may further extend the period provided by paragraph (a) of this section during which a banking entity may acquire or retain an ownership interest in, or otherwise provide additional capital to, a covered fund if:

(i) The fund is an illiquid fund; and

(ii) The acquisition or retention of such interest, or provision of additional capital, is necessary to fulfill a contractual obligation of the banking entity that was in effect on May 1, 2010.

(2) *Duration limited.* The Board may grant a banking entity only one extension under paragraph (b)(1) of this section and such extension:

(i) May not exceed 5 years beyond any conformance period granted under paragraph (a)(3) of this section; and

(ii) Shall terminate automatically on the date during any such extension on which the banking entity is no longer under a contractual obligation described in paragraph (b)(1)(ii) of this section.

(3) *Contractual obligation.* For purposes of this paragraph (b):

(i) A banking entity has a contractual obligation to take or retain an ownership interest in an illiquid fund if the banking entity is prohibited from redeeming all of its ownership interests in the fund, and from selling or otherwise transferring all such ownership interests to a person that is not an affiliate of the banking entity—

(A) Under the terms of the banking entity's ownership interest in the fund or the banking entity's other contractual arrangements with the fund or unaffiliated investors in the fund; or

(B) If the banking entity is the sponsor of the fund, under the terms of a written representation made by the banking entity in the fund's offering materials distributed to potential investors;

(ii) A banking entity has a contractual obligation to provide additional capital to an illiquid fund if the banking entity is required to provide additional capital to such fund—

(A) Under the terms of its ownership interest in the fund or the banking entity's other contractual arrangements with the fund or unaffiliated investors in the fund; or

(B) If the banking entity is the sponsor of the fund, under the terms of a written representation made by the banking entity in the fund's offering materials distributed to potential investors; and

(iii) A banking entity shall be considered to have a contractual obligation for purposes of paragraph (b)(3)(i) or (ii) of this section only if:

(A) The obligation may not be terminated by the banking entity or any of its subsidiaries or affiliates under the terms of its agreement with the fund; and

(B) In the case of an obligation that may be terminated with the consent of other persons, the banking entity and its subsidiaries and affiliates have used their reasonable best efforts to obtain such consent and such consent has been denied.

(c) *Approval Required to Hold Interests in Excess of Time Limit.* The conformance period in paragraph (a) of this section may be extended in accordance with paragraph (a)(3) or (b) only with the approval of the Board. A banking entity that seeks the Board's approval for an extension of the conformance period under paragraph (a)(3) or for an extended transition period under paragraph (b)(1) must:

(1) Submit a request in writing to the Board at least 180 days prior to the expiration of the applicable time period;

(2) Provide the reasons why the banking entity believes the extension should be granted, including information that addresses the factors in paragraph (d)(1) of this section; and

(3) Provide a detailed explanation of the banking entity's plan for divesting or conforming the activity or investment(s).

(d) *Factors governing Board determinations.*

(1) *Extension requests generally.*—In reviewing any application by a specific company for an extension under paragraph (a)(3) or (b)(1) of this section, the Board may consider all the facts and circumstances related to the activity, investment, or fund, including, to the extent relevant:

(i) Whether the activity or investment:

(A) Involves or results in material conflicts of interest between the banking entity and its clients, customers or counterparties;

(B) Would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(C) Would pose a threat to the safety and soundness of the banking entity; or

(D) Would pose a threat to the financial stability of the United States;

(ii) Market conditions;

(iii) The nature of the activity or investment;

(iv) The date that the banking entity's contractual obligation to make or retain an investment in the fund was incurred and when it expires;

(v) The contractual terms governing the banking entity's interest in the fund;

(vi) The degree of control held by the banking entity over investment decisions of the fund;

(vii) The types of assets held by the fund, including whether any assets that were illiquid when first acquired by the fund have become liquid assets, such as, for example, because any statutory, regulatory, or contractual restrictions on the offer, sale, or transfer of such assets have expired;

(viii) The date on which the fund is expected to wind up its activities and liquidate, or its investments may be redeemed or sold;

(ix) The total exposure of the banking entity to the activity or investment and the risks that disposing of, or maintaining, the investment or activity may pose to the banking entity or the financial stability of the United States;

(x) The cost to the banking entity of divesting or disposing of the activity or investment within the applicable period;

(xi) Whether the divestiture or conformance of the activity or investment would involve or result in a material conflict of interest between the banking entity and unaffiliated clients, customers or counterparties to which it owes a duty;

(xii) The banking entity's prior efforts to divest or conform the activity or investment(s), including, with respect to an illiquid fund, the extent to which the banking entity has made efforts to terminate or obtain a waiver of its contractual obligation to take or retain an equity, partnership, or other ownership interest in, or provide additional capital to, the illiquid fund; and

(xiii) Any other factor that the Board believes appropriate.

(2) *Timing of Board review.* The Board will seek to act on any request for an extension under paragraph (a)(3) or (b)(1) of this section no later than 90 calendar days after the receipt of a complete record with respect to such request.

(3) *Consultation.* In the case of a banking entity that is primarily supervised by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to the approval of a request by the banking entity for an extension under paragraph (a)(3) or (b)(1) of this section.

(e) *Authority to impose restrictions on activities or investments during any extension period.*

(1) *In general.* The Board may impose such conditions on any extension approved under paragraph (a)(3) or (b)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act (12 U.S.C. 1851) and this part.

(2) *Consultation.* In the case of a banking entity that is primarily supervised by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to imposing conditions on the approval of a request by the banking entity for an extension under paragraph (a)(3) or (b)(1) of this section.

§ 248.32 Conformance period for nonbank financial companies supervised by the Board engaged in prohibited proprietary trading or covered fund activities and investments.

(a) *Divestiture requirement.* A nonbank financial company supervised by the Board shall come into compliance with all applicable requirements of section 13 of the Bank Holding Company Act (12 U.S.C. 1851) and this subpart, including any capital requirements or quantitative limitations adopted thereunder and applicable to the company, not later than 2 years after the date the company becomes a nonbank financial company supervised by the Board.

(b) *Extensions.* The Board may, by rule or order, extend the two-year period under paragraph (a) of this section by not more than three separate one-year periods, if, in the judgment of the Board, each such one-year extension is consistent with the purposes of section 13 of the BHC Act (12 U.S.C. 1851) and this part and would not be detrimental to the public interest.

(c) *Approval required to hold interests in excess of time limit.* A nonbank financial company supervised by the Board that seeks the Board's approval for an extension of the conformance period under paragraph (b) of this section must:

(1) Submit a request in writing to the Board at least 180 days prior to the expiration of the applicable time period;

(2) Provide the reasons why the nonbank financial company supervised by the Board believes the extension should be granted; and

(3) Provide a detailed explanation of the company's plan for conforming the activity or investment(s) to any applicable requirements established under section 13(a)(2) or (f)(4) of the Bank Holding Company Act (12 U.S.C. 1851(a)(2) and (f)(4)).

(d) *Factors governing Board determinations.*

(1) *In general.* In reviewing any application for an extension under paragraph (b) of this section, the Board may consider all the facts and circumstances related to the nonbank financial company and the request including, to the extent determined relevant by the Board, the factors described in § 225.181(d)(1) of this chapter.

(2) *Timing.* The Board will seek to act on any request for an extension under paragraph (b) of this section no later than 90 calendar days after the receipt of a complete record with respect to such request.

(e) *Authority to impose restrictions on activities or investments during any extension period.* The Board may impose conditions on any extension approved under paragraph (b) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the nonbank financial company or the financial stability of the United States, address material conflicts of interest or other unsound practices, or otherwise further the purposes of section 13 of the BHC Act (12 U.S.C. 1851) and this part.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

List of Subjects in 12 CFR Part 351

Banks, banking, Capital, Compensation, Conflict of interests, Credit, Derivatives, Government securities, Insurance, Insurance companies, Investments, Penalties, Reporting and recordkeeping requirements, Risk, Risk retention, Securities, State nonmember banks, State savings associations, Trusts and trustees.

Authority and Issuance

For the reasons set forth in the Supplementary Information, the Federal Deposit Insurance Corporation proposes to add the text of the common rule as set forth at the end of the Supplementary Information as Part 351 to chapter III of Title 12, Code of Federal Regulations, modified as follows:

PART 351—PROPRIETARY TRADING AND RELATIONSHIPS WITH COVERED FUNDS

13. The authority citation for part 351 is added to read as follows:

Authority: 12 U.S.C. 1851; 12 U.S.C. 1801 *et seq.,* and 3103 *et seq.*

14. Part 351 is added as set forth at the end of the Common Preamble.

15. Part 351 is amended by:

a. Removing ''[Agency]'' wherever it appears and adding in its place ''the FDIC''; and

b. Removing ''[The Agency]'' wherever it appears and adding in its place ''The FDIC''.

16. Section 351.1 is added to read as follows:

§ 351.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part is issued by the FDIC under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds by certain banking entities, including any insured depository institution for which the FDIC is the appropriate Federal banking agency. This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds, and explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to any insured depository institution for which the FDIC is the appropriate Federal banking agency. This part takes effect on July 21, 2012.

(d) *Relationship to other authorities.* Except as otherwise provided in under section 13 of the Bank Holding Company Act, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of Bank Holding Company Act shall apply to the activities of a covered banking entity, even if such activities are authorized for a covered banking entity under other applicable provisions of law.

17. Paragraph (j) of § 351.2 is added to read as follows:

§ 351.2 Definitions.

* * * * *

(j) *Covered banking entity* means any banking entity that is an insured depository institution for which the FDIC is the appropriate Federal banking agency, as that term is defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

* * * * *

SECURITIES AND EXCHANGE COMMISSION

List of Subjects in 17 CFR Part 255

Banks, Brokers, Dealers, Investment advisers, Recordkeeping, Reporting, Securities.

Authority and Issuance

For the reasons set forth in the Supplementary Information, the Securities and Exchange Commission proposes to add the text of the common rule as set forth at the end of the Supplementary Information as Part 255 to chapter II of Title 17, Code of Federal Regulations, modified as follows:

PART 255—PROPRIETARY TRADING AND RELATIONSHIPS WITH COVERED FUNDS

18. The authority for part 255 is added to read as follows:

Authority: 12 U.S.C. 1851, 15 U.S.C. 78*o*(c)(3)(A), 78*o*–10(f), (j), 78q(a), 78w.

19. Part 255 is added as set forth at the end of the Common Preamble.

20. Part 255 is amended by:

a. Removing ''[Agency]'' wherever it appears and adding in its place ''SEC''; and

b. Removing ''[The Agency]'' wherever it appears and adding in its place ''The SEC.''

21. Section 255.1 is added to read as follows:

§ 255.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part [1] is issued by the SEC under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851) and sections 15(c)(3)(A), 15F(f), 15F(j), 17(a), and 23 of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(c)(3)(A), 78*o*-10(f), (j), 78q(a), 78w.).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds by certain banking entities, including registered broker-dealers, registered investment advisers, and registered security-based swap dealers, among others identified in section 2(12)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. 5301(12)(B)). This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds, and explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to covered banking entities described in § 255.2(j). This part takes effect on July 21, 2012.

(d) *Relationship to other authorities.* Except as otherwise provided in under section 13 of the BHC Act, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of BHC Act shall apply to the activities of a covered banking entity, even if such activities are authorized for a covered banking entity under other applicable provisions of law.

22. Paragraph (j) of § 255.2 is added to read as follows:

§ 225.2 Definitions.

* * * * *

(j) *Covered banking entity* means any entity described in paragraph (e) of this section for which the SEC is the primary financial regulatory agency, as defined in section 2(12)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. 5301(12)(B)).

23. Section 225.10(a) is revised to read as follows:

§ 255.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

* * * * *

(a)(1) *General prohibition.* Except as otherwise provided in this subpart, a covered banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(2) *Registered investment advisers.* A covered banking entity that is a covered banking entity because it is an investment adviser identified in section 2(12)(B)(iii) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 shall comply with the restrictions on covered fund activities or investments set forth in subpart C and § ____.20 of subpart D issued by the agency identified in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)) that regulates the banking entity described in § 255.2 (e)(1), (2) or (3) with which the investment adviser is affiliated.

[1] Code of Federal Regulations, title 17, chapter II, part 255.

Note to paragraph (a): Nothing set forth in paragraph (a)(2) of this section shall limit the SEC's authority under any other provision of law, including pursuant to section 13 of the Bank Holding Company Act.

* * * * *

Dated: October 7, 2011.

John Walsh,

Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, October 11, 2011.

Jennifer J. Johnson,

Secretary of the Board.

By order of the Board of Directors.

Dated at Washington, DC, this 11th day of October, 2011.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

By the Securities and Exchange Commission.

Dated: October 12, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–27184 Filed 11–4–11; 8:45 am]

BILLING CODE 6210–01–P; 8011–11–P; 4810–33–P; 6714–01–P

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to an Exploration Drilling Program Near Camden Bay, Beaufort Sea, AK; Notice

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA804

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to an Exploration Drilling Program Near Camden Bay, Beaufort Sea, AK;

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS received an application from Shell Offshore Inc. (Shell) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to offshore exploration drilling on Outer Continental Shelf (OCS) leases in the Beaufort Sea, Alaska. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to Shell to take, by Level B harassment only, eight species of marine mammals during the specified activity.

DATES: Comments and information must be received no later than December 7, 2011.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.Nachman@noaa.gov.* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

A copy of the application, which contains several attachments, including Shell's marine mammal mitigation and monitoring plan and Plan of Cooperation, used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [''Level A harassment'']; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [''Level B harassment''].

Summary of Request

NMFS received an application on May 10, 2011, from Shell for the taking, by harassment, of marine mammals incidental to offshore exploration drilling on OCS leases in the Beaufort Sea, Alaska. NMFS reviewed Shell's application and identified a number of issues requiring further clarification. After addressing comments from NMFS, Shell modified its application and submitted a revised application on September 2, 2011. NMFS carefully evaluated Shell's application, including their analyses, and determined that the application is complete. The September 2, 2011, application is the one available for public comment (see **ADDRESSES**) and considered by NMFS for this proposed IHA.

Shell plans to drill two exploration wells at two drill sites in Camden Bay, Beaufort Sea, Alaska, during the 2012 Arctic open-water season (July through October). Impacts to marine mammals may occur from noise produced by the drillship, zero-offset vertical seismic profile (ZVSP) surveys, and supporting vessels (including icebreakers) and aircraft. Shell has requested an authorization to take 11 marine mammal species by Level B harassment. However, some of these species are not expected to be found in the activity area. Therefore, NMFS is proposing to authorize take of eight marine mammal species, by Level B harassment, incidental to Shell's offshore exploration drilling program in Camden Bay. These species include: Beluga whale (*Delphinapterus leucas*); bowhead whale (*Balaena mysticetus*); gray whale (*Eschrichtius robustus*); harbor porpoise (*Phocoena phocoena*); bearded seal (*Erignathus barbatus*); ringed seal (*Phoca hispida*); spotted seal (*P. largha*); and ribbon seal (*Histriophoca fasciata*).

Description of the Specified Activity and Specified Geographic Region

Shell plans to conduct an offshore exploration drilling program on U.S. Department of the Interior, Bureau of Ocean Energy Management (BOEM, formerly the Minerals Management Service) Alaska OCS leases located north of Point Thomson near Camden Bay in the Beaufort Sea, Alaska, during the 2012 open-water season. During the 2012 drilling program, Shell plans to complete two exploration wells at two

drill sites, one well each on the Torpedo prospect (NR06–04 Flaxman Island lease block 6610, OCS–Y–1941 [Flaxman Island 6610—Torpedo ''H'' or ''J'' drill site]) and the Sivulliq prospect (NR06–04 Flaxman Island lease block 6658, OCS–Y 1805 [Flaxman Island 6658—Sivulliq ''N'' or ''G'' drill sites]). See Figure 1–1 in Shell's application for the lease block and drill site locations (see **ADDRESSES**). All drilling is planned to be vertical.

Exploration Drilling

Shell plans to drill the Torpedo prospect well (Torpedo ''H'' or ''J'') first, followed by the Sivulliq well (Sivulliq ''N'' or ''G''), unless adverse surface conditions or other factors dictate a reversal of drilling sequence. In that case, Shell will mobilize to the Sivulliq prospect and drill there first. Because this is an Arctic program, weather and ice conditions will dictate actual operations. The Torpedo H and J drill sites are located 20.8 and 23.1 mi (33.5 and 37.2 km) from shore in water 120 and 124 ft (36.6 and 37.8 m) deep, respectively. The Sivulliq G and N drill sites are located 16.6 and 16.2 mi (26.7 and 26.1 km) from shore in water 110 and 107 ft (33.5 and 32.6 m) deep, respectively.

(1) Drilling Vessels

Shell plans to use one of two drilling vessels for its proposed 2012 Camden Bay exploratory drilling program: The *Kulluk* (owned by Shell and operated by Noble Drilling [Noble]); or the *Discoverer* (owned and operated by Noble). Only one of these drilling vessels would be used for the Camden Bay program, not both. Information on each vessel is provided next, and additional details can be found in Attachment A of Shell's IHA application (see **ADDRESSES**).

The *Kulluk* has an Arctic Class IV hull design, is capable of drilling in up to 600 ft (182.9 m) of water and is moored using a 12-point anchor system. The vessel is 266 ft (81 m) long. The *Kulluk's* mooring system consists of 12 Hepburn winches located on the outboard side of the main deck. Anchor wires lead off the bottom of each winch drum inboard for approximately 55 ft (16.8 m). The wire is then redirected by a sheave, down through a hawse pipe to an underwater, ice protected, swivel fairlead. The wire travels from the fairlead directly under the hull to the anchor system on the seafloor. The *Kulluk* would have an anchor radius maximum of 3,117 ft (950 m) for the Sivulliq and Torpedo drill sites. While on location at the drill sites, the *Kulluk* will be affixed to the seafloor using 12, 15 metric ton Stevpris anchors arranged in a radial array.

The *Kulluk* is designed to maintain its location in drilling mode in moving ice with thickness up to 4 ft (1.2 m) without the aid of any active ice management. With the aid of the ice management vessels, the *Kulluk* would be able to withstand more severe ice conditions. In more open-water conditions, the *Kulluk* can maintain its drilling location during storm events with wave heights up to 18 ft (5.5 m) while drilling, and can withstand wave heights of up to 40 ft (12.2 m) when not drilling and disconnected (assuming a storm duration of 24 hours).

The *Discoverer* is a true drillship and is a largely self-contained drillship that offers full accommodations for a crew of up to 140 persons. The *Discoverer* is 514 ft (156.7 m) long with a maximum height (above keel) of 274 ft (83.7 m). It is an anchored drillship with an 8-point anchored mooring system and would likely have a maximum anchor radius of 2,969–2,986 ft (905–910 m) at either the Sivulliq or Torpedo drill sites. While on location at the drill sites, the *Discoverer* will be affixed to the seafloor using eight 7,000 kg (7.7 ton) Stevpris anchors arranged in a radial array. The underwater fairleads prevent ice fouling of the anchor lines. Turret mooring allows orientation of the vessel's bow into the prevailing ice drift direction to present minimum hull exposure to drifting ice. The vessel is rotated around the turret by hydraulic jacks. Rotation can be augmented by the use of the fitted bow and stern thrusters. The hull has been reinforced for ice resistance. Ice-strengthened sponsons have been retrofitted to the ship's hull.

(2) Support Vessels

During the 2012 drilling season, the *Kulluk* or *Discoverer* will be attended by 11 vessels that will be used for ice-management, anchor handling, oil spill response (OSR), refueling, resupply, drill mud/cuttings and wastewater transfer, equipment and waste holding, and servicing of the drilling operations. Tables 1–1a and 1–1b in Shell's application provide lists of the support vessels to be used during the drilling program and OSR vessels. The workboats associated with OSR training (which are stored on an OSR barge) are not counted among the 11 attending vessels. All vessels are intended to be either in transit or staged (*i.e.,* on anchor) in the Beaufort Sea during the exploration drilling activities. The oil spill tanker (OST) would be staged such that it would arrive at a recovery site, if needed, within 24 hours of departure from the staging location. The purpose of the OST would be to provide a place to store large volumes of recovered crude oil, emulsion and free water in the unlikely event of a spill, and OSR operations. Additional information on Shell's fleet of oil spill response vessels can be found in the IHA application.

The *M/V Nordica* (*Nordica*) or a similar vessel will serve as the primary ice management vessel in support of the *Kulluk* or *Discoverer. Hull 247* or a similar vessel will provide anchor handling duties, serve as the berthing (accommodations) vessel for the OSR crew, and will also serve as a secondary ice management vessel by managing smaller ice floes that may pose a potential safety issue to the drillship and the support vessels servicing the drillship. This vessel will also provide supplemental oil recovery capability (Vessel of Opportunity Skimming System [VOSS]). When managing ice, the *Nordica* (or similar vessel) and *Hull 247* will generally be confined to a 40° arc up to 3.1 mi (4.9 km) upwind originating at the drilling vessel (see Figure 1–3 in Shell's application). It is anticipated that the ice management vessels will be managing ice for up to 38% of the time when within 25 mi (40 km) of the *Kulluk* or *Discoverer.* Active ice management involves using the ice management vessel to steer larger floes so that their path does not intersect with the drill site. Around-the-clock ice forecasting using real-time satellite coverage (available through Shell Ice and Weather Advisory Center [SIWAC]) will support the ice management duties. When the *Nordica* and *Hull 247* are not needed for ice management, they will reside outside the 25 mi (40 km) radius from the *Kulluk* or *Discoverer* if it is safe to do so. These vessels will enter and exit the Beaufort Sea with the *Kulluk* or *Discoverer.*

The exploration drilling operations will require the transfer of supplies between either the Deadhorse/West Dock shorebase or Dutch Harbor and the drillship (either the *Kulluk* or *Discoverer*). While the *Kulluk* or *Discoverer* is anchored at a drill site, Shell anticipates 24 visits/tie-ups (if the *Kulluk* is the drilling vessel being used) or 8 visits/tie-ups (if the *Discoverer* is being used) throughout the drilling season from support vessels. During resupply, mud/cuttings and other waste streams will be transferred to a deck barge or waste barge for temporary storage, which will be brought south for disposal at the end of the drilling season. Additional information on the resupply and waste removal vessels can be found in Shell's application. Removal of waste and resupply to the

drilling vessels will be conducted the same way regardless of drilling vessel.

(3) Aircraft

An AW139 or Sikorsky S–92 helicopter based in Deadhorse will be used for flights between the shorebase and drill sites. It is expected that on average, up to two flights per day (approximately 12 flights per week) will be necessary to transport supplies and rotate crews. A Sikorsky S–92 based in Barrow will be used for search and rescue operations. Marine mammal monitoring flights will utilize a de Havilland Twin Otter aircraft. The de Havilland Twin Otter is expected to fly daily. Table 1–1c in Shell's application presents the aircraft planned to support the exploration drilling program.

Zero-Offset Vertical Seismic Profile

At the end of each drill hole, Shell may conduct a geophysical survey referred to as ZVSP at each drill site where a well is drilled in 2012. During ZVSP surveys, an airgun array is deployed at a location near or adjacent to the drilling vessel, while receivers are placed (temporarily anchored) in the wellbore. The sound source (airgun array) is fired repeatedly, and the reflected sonic waves are recorded by receivers (geophones) located in the wellbore. The geophones, typically in a string, are then raised up to the next interval in the wellbore, and the process is repeated until the entire wellbore has been surveyed. The purpose of the ZVSP is to gather geophysical information at various depths, which can then be used to tie-in or ground-truth geophysical information from the previous seismic surveys with geological data collected within the wellbore.

Shell intends to conduct a particular form of vertical seismic profile known as a ZVSP, in which the sound source is maintained at a constant location near the wellbore (see Figure 1–2 in Shell's application). A typical sound source that would be used by Shell in 2012 is the ITAGA eight-airgun array, which consists of four 150 in^3 airguns and four 40 in^3 airguns. These airguns can be activated in any combination, and Shell intends to utilize the minimum airgun volume required to obtain an acceptable signal. Current specifications of the array are provided in Table 1–2 of Shell's application. The airgun array is depicted within its frame or sled, which is approximately 6 ft x 5 ft x 10 ft (1.8 m x 1.5 m x 3 m) (see photograph in Shell's application). Typical receivers would consist of a Schlumberger wireline four level Vertical Seismic Imager (VSI) tool, which has four receivers 50-ft (15-m) apart.

A ZVSP survey is normally conducted at each well after total depth is reached but may be conducted at a shallower depth. For each survey, Shell plans to deploy the airgun array over the side of the *Kulluk* or *Discoverer* with a crane (sound source will be 50–200 ft [15–61 m] from the wellhead depending on crane location) to a depth of approximately 10–23 ft (3–7 m) below the water surface. The VSI, with its four receivers, will be temporarily anchored in the wellbore at depth. The sound source will be pressured up to 2,000 pounds per square inch (psi) and activated 5–7 times at approximately 20-second intervals. The VSI will then be moved to the next interval of the wellbore and reanchored, after which the airgun array will again be activated 5–7 times. This process will be repeated until the entire well bore is surveyed in this manner. The interval between anchor points for the VSI usually is between 200 and 300 ft (61 and 91 m). A normal ZVSP survey is conducted over a period of about 10–14 hours, depending on the depth of the well and the number of anchoring points. Therefore, considering a few different scenarios, the airgun array could be fired between 117 and 245 times during the 10–14 hour period. For example, a 7,000-ft (2,133.6-m) well with 200-ft (61-m) spacing and seven activations per station would result in the airgun array being fired 245 times to survey the entire well. That same 7,000-ft (2,133.6-m) well with 300-ft (91-m) spacing and five activations would result in the airgun array being fired 117 times to survey the entire well. The remainder of the time during those 10–14 hours when the airgun is not firing is used to move and anchor the geophone array.

Ice Management and Forecasting

Shell recognizes that the drilling program is located in an area that is characterized by active sea ice movement, ice scouring, and storm surges. In anticipation of potential ice hazards that may be encountered, Shell has developed and will implement an Ice Management Plan (IMP; see Attachment B in Shell's IHA application) to ensure real-time ice and weather forecasting is conducted in order to identify conditions that might put operations at risk and will modify its activities accordingly. The IMP also contains ice threat classification levels depending on the time available to suspend drilling operations, secure the well, and escape from advancing hazardous ice. Real-time ice and weather forecasting will be available to operations personnel for planning purposes and to alert the fleet of impending hazardous ice and weather conditions. Ice and weather forecasting is provided by SIWAC. The center is continuously manned by experienced personnel, who rely on a number of data sources for ice forecasting and tracking, including:

- Radarsat and Envisat data—satellites with Synthetic Aperture Radar, providing all-weather imagery of ice conditions with very high resolution;
- Moderate Resolution Imaging Spectroradiometer—a satellite providing lower resolution visual and near infrared imagery;
- Aerial reconnaissance—provided by specially deployed fixed wing or rotary wing aircraft for confirmation of ice conditions and position;
- Reports from ice specialists on the ice management and anchor handling vessels and from the ice observer on the drillship;
- Incidental ice data provided by commercial ships transiting the area; and
- Information from NOAA ice centers and the University of Colorado.

Drift ice will be actively managed by ice management vessels, consisting of an ice management vessel and an anchor handling vessel. Ice management for safe operation of Shell's planned exploration drilling program will occur far out in the OCS, remote from the vicinities of any routine marine vessel traffic in the Beaufort Sea causing no threat to public safety or services that occurs near to shore. Shell vessels will also communicate movements and activities through the 2012 North Slope Communications Centers. Management of ice by ice management vessels will occur during a drilling season predominated by open water and thus is not expected to contribute to ice hazards, such as ridging, override, or pileup in an offshore or nearshore environment.

The ice-management/anchor handling vessels would manage the ice by deflecting any ice floes that could affect the *Kulluk* or *Discoverer* when it is drilling and would also handle the *Kulluk's* or *Discoverer's* anchors during connection to and separation from the seafloor. When managing ice, the ice management and anchor handling vessels will generally be operating at a 40° arc up to 3.1 mi (4.9 km) upwind originating at the *Kulluk* or *Discoverer* (see Figure 1–3 in Shell's application).

It is anticipated that the ice management vessels will be managing ice for 38% of the time when within 25 mi (40 km) of the *Kulluk* or *Discoverer.*

The ice floe frequency and intensity are unpredictable and could range from no ice to ice sufficiently dense that the fleet has insufficient capacity to continue operating, and the *Kulluk* or *Discoverer* would need to disconnect from its anchors and move off site. If ice is present, ice management activities may be necessary in early July and towards the end of operations in late October, but it is not expected to be needed throughout the proposed drilling season. Shell has indicated that when ice is present at the drill site, ice disturbance will be limited to the minimum needed to allow drilling to continue. First-year ice (*i.e.,* ice that formed in the most recent autumn-winter period) will be the type most likely to be encountered. The ice management vessels will be tasked with managing the ice so that it will flow easily around and past the *Kulluk* or *Discoverer* without building up in front of or around it. This type of ice is managed by the ice management vessel continually moving back and forth across the drift line, directly up-drift of the *Kulluk* or *Discoverer* and making turns at both ends. During ice management, the vessel's propeller is rotating at approximately 15–20 percent of the vessel's propeller rotation capacity. Ice management occurs with slow movements of the vessel using lower power and therefore slower propeller rotation speed (*i.e.,* lower cavitation), allowing for fewer repositions of the vessel, thereby reducing cavitation effects in the water. Occasionally, there may be multi-year ice (*i.e.,* ice that has survived at least one summer melt season) ridges that would be managed at a much slower speed than that used to manage first-year ice.

During Camden Bay exploration drilling operations, Shell has indicated that they do not intend to conduct any icebreaking activities; rather, Shell would deploy its support vessels to manage ice as described here. As detailed in Shell's IMP (see Attachment B of Shell's IHA application), actual breaking of ice would occur only in the unlikely event that ice conditions in the immediate vicinity of operations create a safety hazard for the drilling vessel. In such a circumstance, operations personnel will follow the guidelines established in the IMP to evaluate ice conditions and make the formal designation of a hazardous, ice alert condition, which would trigger the procedures that govern any actual icebreaking operations. Historical data relative to ice conditions in the Beaufort Sea in the vicinity of Shell's planned operations, and during the timeframe for those operations, establish that there is a very low probability (*e.g.,* minimal) for the type of hazardous ice conditions that might necessitate icebreaking (*e.g.,* records of the National Naval Ice Center archives). This probability could be greater at the shoulders of the drilling season (early July or late October); therefore, for purposes of evaluating possible impacts of the planned activities, Shell has assumed limited icebreaking activities for a very limited period of time, and estimated incidental takes of marine mammals from such activities.

Timeframe of Activities

Shell's base plan is for the *Kulluk* or *Discoverer* and the associated support vessels to transit through the Bering Strait, after July 1, 2012, then through the Chukchi Sea, around Pt. Barrow, and east through the Alaskan Beaufort Sea, before arriving on location at the Torpedo ''H'' location on or about July 10, or Sivulliq ''N'' if adverse surface conditions or other factors dictate a reversal of drilling sequence. At the completion of the drilling season on or before October 31, 2012, one or two ice management vessels, along with various support vessels, such as the OSR fleet, will accompany the *Kulluk* or *Discoverer* as it travels west through the Beaufort Sea, then south through the Chukchi Sea and the Bering Strait. Subject to ice conditions, alternate exit routes may be considered. Shell has planned a suspension of all operations beginning on August 25 for the Nuiqsut (Cross Island) and Kaktovik subsistence bowhead whale hunts. During the suspension for the whale hunts, the drilling fleet will leave the Camden Bay project area, will move to a location at or north of 71.25 ° N. latitude and at or west of 146.4 ° W. longitude and will return to resume activities after the Nuiqsut (Cross Island) and Kaktovik subsistence bowhead whale hunts conclude. Shell will consult with the Whaling Captain's Associations of Kaktovik and Nuiqsut to ascertain the conclusion of their respective fall subsistence bowhead whale hunts.

Shell will cease drilling on or before October 31, after which the *Kulluk* or *Discoverer* will exit the Alaskan Beaufort Sea. In total, Shell anticipates that the exploration drilling program will require approximately 78 drilling days, excluding weather delays, the shutdown period to accommodate the fall bowhead whale harvests at Kaktovik and Cross Island (Nuiqsut), or other operational delays. Time to conduct the ZVSP surveys is included in the 78 drilling days. Shell assumes approximately 11 additional days will be needed for drillship mobilization, drillship moves between locations, and drillship demobilization.

Activities associated with the 2012 Camden Bay, Beaufort Sea, exploration drilling program include operation of the drillship (either the *Kulluk* or *Discoverer*), associated support vessels, crew change support, and re-supply, ZVSP surveys, and icebreaking. The *Kulluk* or *Discoverer* will remain at the location of the designated exploration drill sites except when mobilizing and demobilizing to and from Camden Bay, transiting between drill sites, and temporarily moving off location if it is determined ice conditions require such a move to ensure the safety of personnel and/or the environment in accordance with Shell's IMP. Ice management vessels, anchor tenders, and OSR vessels will remain in close proximity to the drillship during drilling operations.

Exploratory Drilling Program Sound Characteristics

Potential impacts to marine mammals could occur from the noise produced by the drillship and its support vessels (including the icebreakers), aircraft, and the airgun array during ZVSP surveys. The drillship produces continuous noise into the marine environment. NMFS currently uses a threshold of 120 dB re 1 μPa (rms) for the onset of Level B harassment from continuous sound sources. This 120 dB threshold is also applicable for the icebreakers when actively managing or breaking ice. The drilling vessel to be used will be either the *Kulluk* or the *Discoverer.* The two vessels are likely to introduce somewhat different levels of sound into the water during the exploration drilling activities. The airgun array proposed to be used by Shell for the ZVSP surveys produces pulsed noise into the marine environment. NMFS currently uses a threshold of 160 dB re 1 μPa (rms) for the onset of Level B harassment from pulsed sound sources.

(1) Drilling Sounds

Exploratory drilling will be conducted from the *Kulluk* or *Discoverer,* vessels specifically designed for such operations in the Arctic. Underwater sound propagation results from the use of generators, drilling machinery, and the rig itself. Received sound levels during vessel-based operations may fluctuate depending on the specific type of activity at a given time and aspect from the vessel. Underwater sound levels may also depend on the specific equipment in operation. Lower sound levels have been reported during well logging than during drilling operations

(Greene, 1987b), and underwater sound levels appeared to be lower at the bow and stern aspects than at the beam (Greene, 1987a).

Most drilling sounds generated from vessel-based operations occur at relatively low frequencies below 600 Hz although tones up to 1,850 Hz were recorded by Greene (1987a) during drilling operations in the Beaufort Sea. At a range of 558 ft (170 m) the 20–1000 Hz band level was 122–125 dB for the drillship *Explorer I.* Underwater sound levels were slightly higher (134 dB) during drilling activity from the *Northern Explorer II* at a range of 656 ft (200 m), although tones were only recorded below 600 Hz. Underwater sound measurements from the *Kulluk* at 0.62 mi (1 km) were higher (143 dB) than from the other two vessels. Sounds from the *Kulluk* were measured in the Beaufort Sea in 1986 and reported by Greene (1987a). The back propagated broadband source level from the measurements (185.5 dB re 1 μPa at 1 m (rms); reported from the 1/3-octave band levels), which included sounds from a support vessel operating nearby, were used to model sound propagation at the Sivulliq prospect near Camden Bay.

Sound measurements from the *Discoverer* have not previously been conducted in the Arctic. However, measurements of sounds produced by the *Discoverer* were made in the South China Sea in 2009 (Austin and Warner, 2010). The results of those measurements were used to model the sound propagation from the *Discoverer* (including a nearby support vessel) at planned exploration drilling locations in the Beaufort Sea (Warner and Hannay, 2011). Broadband source levels of sounds produced by the *Discoverer* varied by activity and direction from the ship but were generally between 177 and 185 dB re 1 μPa at 1 m (rms) (Austin and Warner, 2010). Once on location at the drill sites in Camden Bay, Shell plans to take measurements of the drillship (either the *Kulluk* or *Discoverer*) to quantify the absolute sound levels produced by drilling and to monitor their variations with time, distance, and direction from the drilling vessel.

(2) Vessel Sounds

In addition to the drillship, various types of vessels will be used in support of the operations, including ice management vessels, anchor handlers, offshore supply vessels, barges and tugs, and OSR vessels. Sounds from boats and vessels have been reported extensively (Greene and Moore, 1995; Blackwell and Greene, 2002, 2005, 2006). Numerous measurements of underwater vessel sound have been performed in support of recent industry activity in the Chukchi and Beaufort Seas. Results of these measurements were reported in various 90-day and comprehensive reports since 2007 (*e.g.,* Aerts *et al.,* 2008; Hauser *et al.,* 2008; Brueggeman, 2009; Ireland *et al.,* 2009). For example, Garner and Hannay (2009) estimated sound pressure levels of 100 dB at distances ranging from approximately 1.5 to 2.3 mi (2.4 to 3.7 km) from various types of barges. MacDonald *et al.* (2008) estimated higher underwater sound pressure levels (SPLs) from the seismic vessel *Gilavar* of 120 dB at approximately 13 mi (21 km) from the source, although the sound level was only 150 dB at 85 ft (26 m) from the vessel. Like other industry-generated sound, underwater sound from vessels is generally at relatively low frequencies.

The primary sources of sounds from all vessel classes are propeller cavitation, propeller singing, and propulsion or other machinery. Propeller cavitation is usually the dominant noise source for vessels (Ross, 1976). Propeller cavitation and singing are produced outside the hull, whereas propulsion or other machinery noise originates inside the hull. There are additional sounds produced by vessel activity, such as pumps, generators, flow noise from water passing over the hull, and bubbles breaking in the wake. Icebreakers contribute greater sound levels during icebreaking activities than ships of similar size during normal operation in open water (Richardson *et al.,* 1995a). This higher sound production results from the greater amount of power and propeller cavitation required when operating in thick ice.

Measurements of the icebreaking supply ship *Robert Lemeur* pushing and breaking ice during exploration drilling operations in the Beaufort Sea in 1986 resulted in an estimated broadband source level of 193 dB re 1 μPa at 1 m (Greene, 1987a; Richardson *et al.,* 1995a).

Sound levels during ice management activities would not be as intense as during icebreaking, and the resulting effects to marine species would be less significant in comparison. During ice management, the vessel's propeller is rotating at approximately 15–20 percent of the vessel's propeller rotation capacity. Instead of actually breaking ice, during ice management, the vessel redirects and repositions the ice by pushing it away from the direction of the drillship at slow speeds so that the ice floe does not slip past the vessel bow. Basically, ice management occurs at slower speed, lower power, and slower propeller rotation speed (*i.e.,* lower cavitation), allowing for fewer repositions of the vessel, thereby reducing cavitation effects in the water than would occur during icebreaking. Once on location at the drill sites in Camden Bay, Shell plans to measure the sound levels produced by vessels operating in support of drilling operations. These vessels will include crew change vessels, tugs, ice management vessels, and OSR vessels.

(3) Aircraft Sound

Helicopters may be used for personnel and equipment transport to and from the drillship. Under calm conditions, rotor and engine sounds are coupled into the water within a 26° cone beneath the aircraft. Some of the sound will transmit beyond the immediate area, and some sound will enter the water outside the 26° area when the sea surface is rough. However, scattering and absorption will limit lateral propagation in the shallow water.

Dominant tones in noise spectra from helicopters are generally below 500 Hz (Greene and Moore, 1995). Harmonics of the main rotor and tail rotor usually dominate the sound from helicopters; however, many additional tones associated with the engines and other rotating parts are sometimes present.

Because of doppler shift effects, the frequencies of tones received at a stationary site diminish when an aircraft passes overhead. The apparent frequency is increased while the aircraft approaches and is reduced while it moves away.

Aircraft flyovers are not heard underwater for very long, especially when compared to how long they are heard in air as the aircraft approaches an observer. Helicopters flying to and from the drillship will generally maintain straight-line routes at altitudes of at least 1,500 ft (457 m) above sea level, thereby limiting the received levels at and below the surface. Aircraft travel would be controlled by Federal Aviation Administration approved flight paths.

(4) Vertical Seismic Profile Sound

A typical eight airgun array (4 x 40 in^3 airguns and 4 x 150 in^3 airguns, for a total discharge volume of 760 in^3) would be used to perform ZVSP surveys, if conducted after the completion of each exploratory well. Typically, a single ZVSP survey will be performed when the well has reached proposed total depth or final depth; although, in some instances, a prior ZVSP will have been performed at a

shallower depth. A typical survey will last 10–14 hours, depending on the depth of the well and the number of anchoring points, and include firings of the full array, plus additional firing of a single 40-in^3 airgun to be used as a ''mitigation airgun'' while the geophones are relocated within the wellbore. The source level for the airgun array proposed for use by Shell will differ based on source depth. At a depth of 9.8 ft (3 m), the SPL is 238 dB re 1 μPa at 1 m, and at a depth of 16.4 ft (5 m), the SPL is 241 dB re 1 μPa at 1 m, with most energy between 20 and 140 Hz.

Airguns function by venting high-pressure air into the water. The pressure signature of an individual airgun consists of a sharp rise and then fall in pressure, followed by several positive and negative pressure excursions caused by oscillation of the resulting air bubble. The sizes, arrangement, and firing times of the individual airguns in an array are designed and synchronized to suppress the pressure oscillations subsequent to the first cycle. Typical high-energy airgun arrays emit most energy at 10–120 Hz. However, the pulses contain significant energy up to 500–1,000 Hz and some energy at higher frequencies (Goold and Fish, 1998; Potter *et al.,* 2007).

Although there will be several support vessels in the drilling operations area, NMFS considers the possibility of collisions with marine mammals highly unlikely. Once on location, the majority of the support vessels will remain in the area of the drillship throughout the 2012 drilling season and will not be making trips between the shorebase and the offshore vessels. When not needed for ice management/icebreaking operations, the icebreaker and anchor handler will remain approximately 25 mi (40 km) upwind and upcurrent of the drillship. Any ice management/icebreaking activity would be expected to occur at a distance of 0.6–12 mi (1–19 km) upwind and upcurrent of the drillship. As the crew change/resupply activities are considered part of normal vessel traffic and are not anticipated to impact marine mammals in a manner that would rise to the level of taking, those activities are not considered further in this document.

Description of Marine Mammals in the Area of the Specified Activity

The Beaufort Sea supports a diverse assemblage of marine mammals, including: bowhead, gray, beluga, killer (*Orcinus orca*), minke (*Balaenoptera acutorostrata*), and humpback (*Megaptera novaeangliae*) whales; harbor porpoises; ringed, ribbon, spotted, and bearded seals; narwhal (*Monodon monoceros*); polar bears (*Ursus maritimus*); and walruses (*Odobenus rosmarus divergens;* see Table 4–1 in Shell's application). The bowhead and humpback whales are listed as ''endangered'' under the Endangered Species Act (ESA) and as depleted under the MMPA. Certain stocks or populations of gray, beluga, and killer whales and spotted seals are listed as endangered or are proposed for listing under the ESA; however, none of those stocks or populations occur in the proposed activity area. On December 10, 2010, NMFS published a notice of proposed threatened status for subspecies of the ringed seal (75 FR 77476) and a notice of proposed threatened and not warranted status for subspecies and distinct population segments of the bearded seal (75 FR 77496) in the **Federal Register.** Neither of these two ice seal species is considered depleted under the MMPA. Additionally, the ribbon seal is considered a ''species of concern'' under the ESA. Both the walrus and the polar bear are managed by the U.S. Fish and Wildlife Service (USFWS) and are not considered further in this Notice of Proposed IHA.

Of these species, eight are expected to occur in the area of Shell's proposed operations. These species include: The bowhead, gray, and beluga whales, harbor porpoise, and the ringed, spotted, bearded, and ribbon seals. The marine mammal species that is likely to be encountered most widely (in space and time) throughout the period of the proposed drilling program is the ringed seal. Bowhead whales are also anticipated to occur in the proposed project area more frequently than the other cetacean species; however, their occurrence is not expected until later in the season. Even though harbor porpoise and ribbon seals are not typically sighted in Camden Bay, there have been recent sightings in the Beaufort Sea near the Prudhoe Bay area, so their occurrence could not be completely ruled out. Point Barrow, Alaska, is the approximate northeastern extent of the harbor porpoise's regular range (Suydam and George, 1992), though there are extralimital records east to the mouth of the Mackenzie River in the Northwest Territories, Canada, and recent sightings in the Beaufort Sea in the vicinity of Prudhoe Bay during surveys in 2007 and 2008 (Christie *et al.,* 2009). Two ribbon seal sightings were reported during vessel-based activities near Prudhoe Bay in 2008 (Savarese *et al.,* 2009). Where available, Shell used density estimates from peer-reviewed literature in the application. In cases where density estimates were not readily available in the peer-reviewed literature, Shell used other methods to derive the estimates. NMFS reviewed the density estimate descriptions and articles from which estimates were derived and requested additional information to better explain the density estimates presented by Shell in its application. This additional information was included in the revised IHA application. The explanation for those derivations and the actual density estimates are described later in this document (see the ''Estimated Take by Incidental Harassment'' section).

Other cetacean species that have been observed in the Beaufort Sea but are uncommon or rarely identified in the project area include narwhal and killer, minke, and humpback whales. These species could occur in the project area, but each of these species is uncommon or rare in the area and relatively few encounters with these species are expected during the exploration drilling program. The narwhal occurs in Canadian waters and occasionally in the Beaufort Sea, but it is rare there and is not expected to be encountered. There are scattered records of narwhal in Alaskan waters, including reports by subsistence hunters, where the species is considered extralimital (Reeves *et al.,* 2002). Humpback and minke whales have recently been sighted in the Chukchi Sea but very rarely in the Beaufort Sea. Greene *et al.* (2007) reported and photographed a humpback whale cow/calf pair east of Barrow near Smith Bay in 2007, which is the first known occurrence of humpbacks in the Beaufort Sea. Savarese *et al.* (2009) reported one minke whale sighting in the Beaufort Sea in 2007 and 2008. Due to the rarity of these species in the proposed project area and the remote chance they would be affected by Shell's proposed Beaufort Sea drilling activities, these species are not discussed further in this proposed IHA notice.

Shell's application contains information on the status, distribution, seasonal distribution, abundance, and life history of each of the species under NMFS jurisdiction mentioned in this document. When reviewing the application, NMFS determined that the species descriptions provided by Shell correctly characterized the status, distribution, seasonal distribution, and abundance of each species. Please refer to the application for that information (see **ADDRESSES**). Additional information can also be found in the NMFS Stock Assessment Reports (SAR). The Alaska

2010 SAR is available at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2010.pdf.*

Brief Background on Marine Mammal Hearing

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms have been derived using auditory evoked potentials, anatomical modeling, and other data, Southall *et al.* (2007) designate ''functional hearing groups'' for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): Functional hearing is estimated to occur between approximately 7 Hz and 22 kHz (however, a study by Au *et al.* (2006) of humpback whale songs indicate that the range may extend to at least 24 kHz);
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): Functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): Functional hearing is estimated to occur between approximately 200 Hz and 180 kHz; and
- Pinnipeds in Water: Functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz.

As mentioned previously in this document, six marine mammal species (three cetacean and three pinniped species) are likely to occur in the proposed exploratory drilling area. Of the three cetacean species likely to occur in Shell's proposed project area, two are classified as low frequency cetaceans (*i.e.,* bowhead and gray whales) and one is classified as a mid-frequency cetacean (*i.e.,* beluga whales) (Southall *et al.,* 2007).

Underwater audiograms have been obtained using behavioral methods for four species of phocinid seals: The ringed, harbor, harp, and northern elephant seals (reviewed in Richardson *et al.,* 1995a; Kastak and Schusterman, 1998). Below 30–50 kHz, the hearing threshold of phocinids is essentially flat down to at least 1 kHz and ranges between 60 and 85 dB re 1 µPa. There are few published data on in-water hearing sensitivity of phocid seals below 1 kHz. However, measurements for one harbor seal indicated that, below 1 kHz, its thresholds deteriorated gradually to 96 dB re 1 µPa at 100 Hz from 80 dB re 1 µPa at 800 Hz and from 67 dB re 1 µPa at 1,600 Hz (Kastak and Schusterman, 1998). More recent data suggest that harbor seal hearing at low frequencies may be more sensitive than that and that earlier data were confounded by excessive background noise (Kastelein *et al.,* 2009a,b). If so, harbor seals have considerably better underwater hearing sensitivity at low frequencies than do small odontocetes like belugas (for which the threshold at 100 Hz is about 125 dB).

Pinniped call characteristics are relevant when assessing potential masking effects of man-made sounds. In addition, for those species whose hearing has not been tested, call characteristics are useful in assessing the frequency range within which hearing is likely to be most sensitive. The three species of seals present in the study area, all of which are in the phocid seal group, are all most vocal during the spring mating season and much less so during late summer. In each species, the calls are at frequencies from several hundred to several thousand hertz—above the frequency range of the dominant noise components from most of the proposed oil exploration activities.

Cetacean hearing has been studied in relatively few species and individuals. The auditory sensitivity of bowhead, gray, and other baleen whales has not been measured, but relevant anatomical and behavioral evidence is available. These whales appear to be specialized for low frequency hearing, with some directional hearing ability (reviewed in Richardson *et al.,* 1995a; Ketten, 2000). Their optimum hearing overlaps broadly with the low frequency range where exploration drilling activities, airguns, and associated vessel traffic emit most of their energy.

The beluga whale is one of the better-studied species in terms of its hearing ability. As mentioned earlier, the auditory bandwidth in mid-frequency odontocetes is believed to range from 150 Hz to 160 kHz (Southall *et al.,* 2007); however, belugas are most sensitive above 10 kHz. They have relatively poor sensitivity at the low frequencies (reviewed in Richardson *et al.,* 1995a) that dominate the sound from industrial activities and associated vessels. Nonetheless, the noise from strong low frequency sources is detectable by belugas many kilometers away (Richardson and Wursig, 1997). Also, beluga hearing at low frequencies in open-water conditions is apparently somewhat better than in the captive situations where most hearing studies were conducted (Ridgway and Carder, 1995; Au, 1997). If so, low frequency sounds emanating from drilling activities may be detectable somewhat farther away than previously estimated.

Call characteristics of cetaceans provide some limited information on their hearing abilities, although the auditory range often extends beyond the range of frequencies contained in the calls. Also, understanding the frequencies at which different marine mammal species communicate is relevant for the assessment of potential impacts from manmade sounds. A summary of the call characteristics for bowhead, gray, and beluga whales is provided next.

Most bowhead calls are tonal, frequency-modulated sounds at frequencies of 50–400 Hz. These calls overlap broadly in frequency with the underwater sounds emitted by many of the activities to be performed during Shell's proposed exploration drilling program (Richardson *et al.,* 1995a). Source levels are quite variable, with the stronger calls having source levels up to about 180 dB re 1 µPa at 1 m. Gray whales make a wide variety of calls at frequencies from <100–2,000 Hz (Moore and Ljungblad, 1984; Dalheim, 1987).

Beluga calls include trills, whistles, clicks, bangs, chirps and other sounds (Schevill and Lawrence, 1949; Ouellet, 1979; Sjare and Smith, 1986a). Beluga whistles have dominant frequencies in the 2–6 kHz range (Sjare and Smith, 1986a). This is above the frequency range of most of the sound energy produced by the proposed exploratory drilling activities and associated vessels. Other beluga call types reported by Sjare and Smith (1986a,b) included sounds at mean frequencies ranging upward from 1 kHz.

The beluga also has a very well developed high frequency echolocation system, as reviewed by Au (1993). Echolocation signals have peak frequencies from 40–120 kHz and broadband source levels of up to 219 dB re 1 µPa-m (zero-peak). Echolocation calls are far above the frequency range of the sounds produced by the devices proposed for use during Shell's Camden Bay exploratory drilling program. Therefore, those industrial sounds are

not expected to interfere with echolocation.

Potential Effects of the Specified Activity on Marine Mammals

The likely or possible impacts of the proposed exploratory drilling program in Camden Bay on marine mammals could involve both non-acoustic and acoustic effects. Potential non-acoustic effects could result from the physical presence of the equipment and personnel. Petroleum development and associated activities introduce sound into the marine environment. Impacts to marine mammals are expected to primarily be acoustic in nature. Potential acoustic effects on marine mammals relate to sound produced by drilling activity, vessels, and aircraft, as well as the ZVSP airgun array. The potential effects of sound from the proposed exploratory drilling program might include one or more of the following: Tolerance; masking of natural sounds; behavioral disturbance; non-auditory physical effects; and, at least in theory, temporary or permanent hearing impairment (Richardson *et al.,* 1995a). However, for reasons discussed later in this document, it is unlikely that there would be any cases of temporary, or especially permanent, hearing impairment resulting from these activities. As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.,* 1995a):

(1) The noise may be too weak to be heard at the location of the animal (*i.e.,* lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases but potentially for longer periods of time;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent, and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause a temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

Potential Acoustic Effects From Exploratory Drilling Activities

(1) Tolerance

Numerous studies have shown that underwater sounds from industry activities are often readily detectable by marine mammals in the water at distances of many kilometers. Numerous studies have also shown that marine mammals at distances more than a few kilometers away often show no apparent response to industry activities of various types (Miller *et al.,* 2005; Bain and Williams, 2006). This is often true even in cases when the sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to underwater sound such as airgun pulses or vessels under some conditions, at other times mammals of all three types have shown no overt reactions (*e.g.,* Malme *et al.,* 1986; Richardson *et al.,* 1995; Madsen and Mohl, 2000; Croll *et al.,* 2001; Jacobs and Terhune, 2002; Madsen *et al.,* 2002; Miller *et al.,* 2005). In general, pinnipeds and small odontocetes seem to be more tolerant of exposure to some types of underwater sound than are baleen whales. Richardson *et al.* (1995a) found that vessel noise does not seem to strongly affect pinnipeds that are already in the water. Richardson *et al.* (1995a) went on to explain that seals on haul-outs sometimes respond strongly to the presence of vessels and at other times appear to show considerable tolerance of vessels, and Brueggeman *et al.* (1992, cited in Richardson *et al.,* 1995a) observed ringed seals hauled out on ice pans displaying short-term escape reactions when a ship approached within 0.25–0.5 mi (0.4–0.8 km).

(2) Masking

Masking is the obscuring of sounds of interest by other sounds, often at similar frequencies. Marine mammals are highly dependent on sound, and their ability to recognize sound signals amid other noise is important in communication, predator and prey detection, and, in the case of toothed whales, echolocation. Even in the absence of manmade sounds, the sea is usually noisy. Background ambient noise often interferes with or masks the ability of an animal to detect a sound signal even when that signal is above its absolute hearing threshold. Natural ambient noise includes contributions from wind, waves, precipitation, other animals, and (at frequencies above 30 kHz) thermal noise resulting from molecular agitation (Richardson *et al.,* 1995a). Background noise also can include sounds from human activities. Masking of natural sounds can result when human activities produce high levels of background noise. Conversely, if the background level of underwater noise is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic noise source will not be detectable as far away as would be possible under quieter conditions and will itself be masked.

Although some degree of masking is inevitable when high levels of manmade broadband sounds are introduced into the sea, marine mammals have evolved systems and behavior that function to reduce the impacts of masking. Structured signals, such as the echolocation click sequences of small toothed whales, may be readily detected even in the presence of strong background noise because their frequency content and temporal features usually differ strongly from those of the background noise (Au and Moore, 1988, 1990). The components of background noise that are similar in frequency to the sound signal in question primarily

determine the degree of masking of that signal.

Redundancy and context can also facilitate detection of weak signals. These phenomena may help marine mammals detect weak sounds in the presence of natural or manmade noise. Most masking studies in marine mammals present the test signal and the masking noise from the same direction. The sound localization abilities of marine mammals suggest that, if signal and noise come from different directions, masking would not be as severe as the usual types of masking studies might suggest (Richardson *et al.,* 1995a). The dominant background noise may be highly directional if it comes from a particular anthropogenic source such as a ship or industrial site. Directional hearing may significantly reduce the masking effects of these noises by improving the effective signal-to-noise ratio. In the cases of high-frequency hearing by the bottlenose dolphin, beluga whale, and killer whale, empirical evidence confirms that masking depends strongly on the relative directions of arrival of sound signals and the masking noise (Penner *et al.,* 1986; Dubrovskiy, 1990; Bain *et al.,* 1993; Bain and Dahlheim, 1994). Toothed whales, and probably other marine mammals as well, have additional capabilities besides directional hearing that can facilitate detection of sounds in the presence of background noise. There is evidence that some toothed whales can shift the dominant frequencies of their echolocation signals from a frequency range with a lot of ambient noise toward frequencies with less noise (Au *et al.,* 1974, 1985; Moore and Pawloski, 1990; Thomas and Turl, 1990; Romanenko and Kitain, 1992; Lesage *et al.,* 1999). A few marine mammal species are known to increase the source levels or alter the frequency of their calls in the presence of elevated sound levels (Dahlheim, 1987; Au, 1993; Lesage *et al.,* 1993, 1999; Terhune, 1999; Foote *et al.,* 2004; Parks *et al.,* 2007, 2009; Di Iorio and Clark, 2009; Holt *et al.,* 2009).

These data demonstrating adaptations for reduced masking pertain mainly to the very high frequency echolocation signals of toothed whales. There is less information about the existence of corresponding mechanisms at moderate or low frequencies or in other types of marine mammals. For example, Zaitseva *et al.* (1980) found that, for the bottlenose dolphin, the angular separation between a sound source and a masking noise source had little effect on the degree of masking when the sound frequency was 18 kHz, in contrast to the pronounced effect at higher frequencies. Directional hearing has been demonstrated at frequencies as low as 0.5–2 kHz in several marine mammals, including killer whales (Richardson *et al.,* 1995a). This ability may be useful in reducing masking at these frequencies. In summary, high levels of noise generated by anthropogenic activities may act to mask the detection of weaker biologically important sounds by some marine mammals. This masking may be more prominent for lower frequencies. For higher frequencies, such as that used in echolocation by toothed whales, several mechanisms are available that may allow them to reduce the effects of such masking.

Masking effects of underwater sounds from Shell's proposed activities on marine mammal calls and other natural sounds are expected to be limited. For example, beluga whales primarily use high-frequency sounds to communicate and locate prey; therefore, masking by low-frequency sounds associated with drilling activities is not expected to occur (Gales, 1982, as cited in Shell, 2009). If the distance between communicating whales does not exceed their distance from the drilling activity, the likelihood of potential impacts from masking would be low (Gales, 1982, as cited in Shell, 2009). At distances greater than 660–1,300 ft (200–400 m), recorded sounds from drilling activities did not affect behavior of beluga whales, even though the sound energy level and frequency were such that it could be heard several kilometers away (Richardson *et al.,* 1995b). This exposure resulted in whales being deflected from the sound energy and changing behavior. These minor changes are not expected to affect the beluga whale population (Richardson *et al.,* 1991; Richard *et al.,* 1998). Brewer *et al.* (1993) observed belugas within 2.3 mi (3.7 km) of the drilling unit *Kulluk* during drilling; however, the authors do not describe any behaviors that may have been exhibited by those animals. Please refer to the Arctic Multiple-Sale Draft Environmental Impact Statement (USDOI MMS, 2008), available on the Internet at: *http://www.mms.gov/alaska/ref/EIS%20EA/ArcticMultiSale_209/_DEIS.htm,* for more detailed information.

There is evidence of other marine mammal species continuing to call in the presence of industrial activity. Annual acoustical monitoring near BP's Northstar production facility during the fall bowhead migration westward through the Beaufort Sea has recorded thousands of calls each year (for examples, see Richardson *et al.,* 2007; Aerts and Richardson, 2008). Construction, maintenance, and operational activities have been occurring from this facility for over 10 years. To compensate and reduce masking, some mysticetes may alter the frequencies of their communication sounds (Richardson *et al.,* 1995a; Parks *et al.,* 2007). Masking processes in baleen whales are not amenable to laboratory study, and no direct measurements on hearing sensitivity are available for these species. It is not currently possible to determine with precision the potential consequences of temporary or local background noise levels. However, Parks *et al.* (2007) found that right whales (a species closely related to the bowhead whale) altered their vocalizations, possibly in response to background noise levels. For species that can hear over a relatively broad frequency range, as is presumed to be the case for mysticetes, a narrow band source may only cause partial masking. Richardson *et al.* (1995a) note that a bowhead whale 12.4 mi (20 km) from a human sound source, such as that produced during oil and gas industry activities, might hear strong calls from other whales within approximately 12.4 mi (20 km), and a whale 3.1 mi (5 km) from the source might hear strong calls from whales within approximately 3.1 mi (5 km). Additionally, masking is more likely to occur closer to a sound source, and distant anthropogenic sound is less likely to mask short-distance acoustic communication (Richardson *et al.,* 1995a).

Although some masking by marine mammal species in the area may occur, the extent of the masking interference will depend on the spatial relationship of the animal and Shell's activity. Almost all energy in the sounds emitted by drilling and other operational activities is at low frequencies, predominantly below 250 Hz with another peak centered around 1,000 Hz. Most energy in the sounds from the vessels and aircraft to be used during this project is below 1 kHz (Moore *et al.,* 1984; Greene and Moore, 1995; Blackwell *et al.,* 2004b; Blackwell and Greene, 2006). These frequencies are mainly used by mysticetes but not by odontocetes. Therefore, masking effects would potentially be more pronounced in the bowhead and gray whales that might occur in the proposed project area. If, as described later in this document, certain species avoid the proposed drilling locations, impacts from masking are anticipated to be low.

(3) Behavioral Disturbance Reactions

Behavioral responses to sound are highly variable and context-specific.

Many different variables can influence an animal's perception of and response to (in both nature and magnitude) an acoustic event. An animal's prior experience with a sound or sound source affects whether it is less likely (habituation) or more likely (sensitization) to respond to certain sounds in the future (animals can also be innately pre-disposed to respond to certain sounds in certain ways; Southall *et al.,* 2007). Related to the sound itself, the perceived nearness of the sound, bearing of the sound (approaching vs. retreating), similarity of a sound to biologically relevant sounds in the animal's environment (*i.e.,* calls of predators, prey, or conspecifics), and familiarity of the sound may affect the way an animal responds to the sound (Southall *et al.,* 2007). Individuals (of different age, gender, reproductive status, *etc.*) among most populations will have variable hearing capabilities and differing behavioral sensitivities to sounds that will be affected by prior conditioning, experience, and current activities of those individuals. Often, specific acoustic features of the sound and contextual variables (*i.e.,* proximity, duration, or recurrence of the sound or the current behavior that the marine mammal is engaged in or its prior experience), as well as entirely separate factors such as the physical presence of a nearby vessel, may be more relevant to the animal's response than the received level alone.

Exposure of marine mammals to sound sources can result in (but is not limited to) no response or any of the following observable responses: Increased alertness; orientation or attraction to a sound source; vocal modifications; cessation of feeding; cessation of social interaction; alteration of movement or diving behavior; avoidance; habitat abandonment (temporary or permanent); and, in severe cases, panic, flight, stampede, or stranding, potentially resulting in death (Southall *et al.,* 2007). On a related note, many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007).

Detailed studies regarding responses to anthropogenic sound have been conducted on humpback, gray, and bowhead whales and ringed seals. Less detailed data are available for some other species of baleen whales, sperm whales, small toothed whales, and sea otters. The following sub-sections provide examples of behavioral responses that provide an idea of the variability in behavioral responses that would be expected given the different sensitivities of marine mammal species to sound.

Baleen Whales—Richardson *et al.* (1995b) reported changes in surfacing and respiration behavior and the occurrence of turns during surfacing in bowhead whales exposed to playback of underwater sound from drilling activities. These behavioral effects were localized and occurred at distances up to 1.2–2.5 mi (2–4 km).

Some bowheads appeared to divert from their migratory path after exposure to projected icebreaker sounds. Other bowheads however, tolerated projected icebreaker sound at levels 20 dB and more above ambient sound levels. The source level of the projected sound however, was much less than that of an actual icebreaker, and reaction distances to actual icebreaking may be much greater than those reported here for projected sounds.

Brewer *et al.* (1993) and Hall *et al.* (1994) reported numerous sightings of marine mammals including bowhead whales in the vicinity of offshore drilling operations in the Beaufort Sea. One bowhead whale sighting was reported within approximately 1,312 ft (400 m) of a drilling vessel although most other bowhead sightings were at much greater distances. Few bowheads were recorded near industrial activities by aerial observers. After controlling for spatial autocorrelation in aerial survey data from Hall *et al.* (1994) using a Mantel test, Schick and Urban (2000) found that the variable describing straight line distance between the rig and bowhead whale sightings was not significant but that a variable describing threshold distances between sightings and the rig was significant. Thus, although the aerial survey results suggested substantial avoidance of the operations by bowhead whales, observations by vessel-based observers indicate that at least some bowheads may have been closer to industrial activities than was suggested by results of aerial observations.

Richardson *et al.* (2008) reported a slight change in the distribution of bowhead whale calls in response to operational sounds on BP's Northstar Island. The southern edge of the call distribution ranged from 0.47 to 1.46 mi (0.76 to 2.35 km) farther offshore, apparently in response to industrial sound levels. This result however, was only achieved after intensive statistical analyses, and it is not clear that this represented a biologically significant effect.

Patenaude *et al.* (2002) reported fewer behavioral responses to aircraft overflights by bowhead compared to beluga whales. Behaviors classified as reactions consisted of short surfacings, immediate dives or turns, changes in behavior state, vigorous swimming, and breaching. Most bowhead reaction resulted from exposure to helicopter activity and little response to fixed-wing aircraft was observed. Most reactions occurred when the helicopter was at altitudes ≤ 492 ft (150 m) and lateral distances ≤ 820 ft (250 m; Nowacek *et al.,* 2007).

During their study, Patenaude *et al.* (2002) observed one bowhead whale cow-calf pair during four passes totaling 2.8 hours of the helicopter and two pairs during Twin Otter overflights. All of the helicopter passes were at altitudes of 49–98 ft (15–30 m). The mother dove both times she was at the surface, and the calf dove once out of the four times it was at the surface. For the cow-calf pair sightings during Twin Otter overflights, the authors did not note any behaviors specific to those pairs. Rather, the reactions of the cow-calf pairs were lumped with the reactions of other groups that did not consist of calves.

Richardson *et al.* (1995b) and Moore and Clarke (2002) reviewed a few studies that observed responses of gray whales to aircraft. Cow-calf pairs were quite sensitive to a turboprop survey flown at 1,000 ft (305 m) altitude on the Alaskan summering grounds. In that survey, adults were seen swimming over the calf, or the calf swam under the adult (Ljungblad *et al.,* 1983, cited in Richardson *et al.,* 1995b and Moore and Clarke, 2002). However, when the same aircraft circled for more than 10 minutes at 1,050 ft (320 m) altitude over a group of mating gray whales, no reactions were observed (Ljungblad *et al.,* 1987, cited in Moore and Clarke, 2002). Malme *et al.* (1984, cited in Richardson *et al.,* 1995b and Moore and Clarke, 2002) conducted playback experiments on migrating gray whales. They exposed the animals to underwater noise recorded from a Bell 212 helicopter (estimated altitude=328 ft [100 m]), at an average of three simulated passes per minute. The authors observed that whales changed their swimming course and sometimes slowed down in response to the playback sound but proceeded to migrate past the

transducer. Migrating gray whales did not react overtly to a Bell 212 helicopter at greater than 1,394 ft (425 m) altitude, occasionally reacted when the helicopter was at 1,000–1,198 ft (305–365 m), and usually reacted when it was below 825 ft (250 m; Southwest Research Associates, 1988, cited in Richardson *et al.,* 1995b and Moore and Clarke, 2002). Reactions noted in that study included abrupt turns or dives or both. Green *et al.* (1992, cited in Richardson *et al.,* 1995b) observed that migrating gray whales rarely exhibited noticeable reactions to a straight-line overflight by a Twin Otter at 197 ft (60 m) altitude. Restrictions on aircraft altitude will be part of the proposed mitigation measures (described in the ''Proposed Mitigation'' section later in this document) during the proposed drilling activities, and overflights are likely to have little or no disturbance effects on baleen whales. Any disturbance that may occur would likely be temporary and localized.

Southall *et al.* (2007, Appendix C) reviewed a number of papers describing the responses of marine mammals to non-pulsed sound, such as that produced during exploratory drilling operations. In general, little or no response was observed in animals exposed at received levels from 90–120 dB re 1 µPa (rms). Probability of avoidance and other behavioral effects increased when received levels were from 120–160 dB re 1 µPa (rms). Some of the relevant reviews contained in Southall *et al.* (2007) are summarized next.

Baker *et al.* (1982) reported some avoidance by humpback whales to vessel noise when received levels were 110–120 dB (rms) and clear avoidance at 120–140 dB (sound measurements were not provided by Baker but were based on measurements of identical vessels by Miles and Malme, 1983).

Malme *et al.* (1983, 1984) used playbacks of sounds from helicopter overflight and drilling rigs and platforms to study behavioral effects on migrating gray whales. Received levels exceeding 120 dB induced avoidance reactions. Malme *et al.* (1984) calculated 10%, 50%, and 90% probabilities of gray whale avoidance reactions at received levels of 110, 120, and 130 dB, respectively. Malme *et al.* (1986) observed the behavior of feeding gray whales during four experimental playbacks of drilling sounds (50 to 315 Hz; 21-min overall duration and 10% duty cycle; source levels of 156–162 dB). In two cases for received levels of 100–110 dB, no behavioral reaction was observed. However, avoidance behavior was observed in two cases where received levels were 110–120 dB.

Richardson *et al.* (1990) performed 12 playback experiments in which bowhead whales in the Alaskan Arctic were exposed to drilling sounds. Whales generally did not respond to exposures in the 100 to 130 dB range, although there was some indication of minor behavioral changes in several instances.

McCauley *et al.* (1996) reported several cases of humpback whales responding to vessels in Hervey Bay, Australia. Results indicated clear avoidance at received levels between 118 to 124 dB in three cases for which response and received levels were observed/measured.

Palka and Hammond (2001) analyzed line transect census data in which the orientation and distance off transect line were reported for large numbers of minke whales. The authors developed a method to account for effects of animal movement in response to sighting platforms. Minor changes in locomotion speed, direction, and/or diving profile were reported at ranges from 1,847 to 2,352 ft (563 to 717 m) at received levels of 110 to 120 dB.

Biassoni *et al.* (2000) and Miller *et al.* (2000) reported behavioral observations for humpback whales exposed to a low-frequency sonar stimulus (160- to 330-Hz frequency band; 42-s tonal signal repeated every 6 min; source levels 170 to 200 dB) during playback experiments. Exposure to measured received levels ranging from 120 to 150 dB resulted in variability in humpback singing behavior. Croll *et al.* (2001) investigated responses of foraging fin and blue whales to the same low frequency active sonar stimulus off southern California. Playbacks and control intervals with no transmission were used to investigate behavior and distribution on time scales of several weeks and spatial scales of tens of kilometers. The general conclusion was that whales remained feeding within a region for which 12 to 30% of exposures exceeded 140 dB.

Frankel and Clark (1998) conducted playback experiments with wintering humpback whales using a single speaker producing a low-frequency ''M-sequence'' (sine wave with multiple-phase reversals) signal in the 60 to 90 Hz band with output of 172 dB at 1 m. For 11 playbacks, exposures were between 120 and 130 dB re 1 µPa (rms) and included sufficient information regarding individual responses. During eight of the trials, there were no measurable differences in tracks or bearings relative to control conditions, whereas on three occasions, whales either moved slightly away from (n = 1) or towards (n = 2) the playback speaker during exposure. The presence of the source vessel itself had a greater effect than did the M-sequence playback.

Finally, Nowacek *et al.* (2004) used controlled exposures to demonstrate behavioral reactions of northern right whales to various non-pulse sounds. Playback stimuli included ship noise, social sounds of conspecifics, and a complex, 18-min ''alert'' sound consisting of repetitions of three different artificial signals. Ten whales were tagged with calibrated instruments that measured received sound characteristics and concurrent animal movements in three dimensions. Five out of six exposed whales reacted strongly to alert signals at measured received levels between 130 and 150 dB (*i.e.,* ceased foraging and swam rapidly to the surface). Two of these individuals were not exposed to ship noise, and the other four were exposed to both stimuli. These whales reacted mildly to conspecific signals. Seven whales, including the four exposed to the alert stimulus, had no measurable response to either ship sounds or actual vessel noise.

Toothed Whales—Most toothed whales have the greatest hearing sensitivity at frequencies much higher than that of baleen whales and may be less responsive to low-frequency sound commonly associated with oil and gas industry exploratory drilling activities. Richardson *et al.* (1995b) reported that beluga whales did not show any apparent reaction to playback of underwater drilling sounds at distances greater than 656–1,312 ft (200–400 m). Reactions included slowing down, milling, or reversal of course after which the whales continued past the projector, sometimes within 164–328 ft (50–100 m). The authors concluded (based on a small sample size) that the playback of drilling sounds had no biologically significant effects on migration routes of beluga whales migrating through pack ice and along the seaward side of the nearshore lead east of Pt. Barrow in spring.

At least six of 17 groups of beluga whales appeared to alter their migration path in response to underwater playbacks of icebreaker sound (Richardson *et al.,* 1995b). Received levels from the icebreaker playback were estimated at 78–84 dB in the 1/3-octave band centered at 5,000 Hz, or 8–14 dB above ambient. If beluga whales reacted to an actual icebreaker at received levels of 80 dB, reactions would be expected to occur at distances on the order of 6.2 mi (10 km). Finley *et al.* (1990) also reported beluga avoidance of icebreaker activities in the Canadian High Arctic at distances of

22–31 mi (35–50 km). In addition to avoidance, changes in dive behavior and pod integrity were also noted.

Patenaude *et al.* (2002) reported that beluga whales appeared to be more responsive to aircraft overflights than bowhead whales. Changes were observed in diving and respiration behavior, and some whales veered away when a helicopter passed at ≤ 820 ft (250 m) lateral distance at altitudes up to 492 ft (150 m). However, some belugas showed no reaction to the helicopter. Belugas appeared to show less response to fixed-wing aircraft than to helicopter overflights.

In reviewing responses of cetaceans with best hearing in mid-frequency ranges, which includes toothed whales, Southall *et al.* (2007) reported that combined field and laboratory data for mid-frequency cetaceans exposed to non-pulse sounds did not lead to a clear conclusion about received levels coincident with various behavioral responses. In some settings, individuals in the field showed profound (significant) behavioral responses to exposures from 90–120 dB, while others failed to exhibit such responses for exposure to received levels from 120–150 dB. Contextual variables other than exposure received level, and probable species differences, are the likely reasons for this variability. Context, including the fact that captive subjects were often directly reinforced with food for tolerating noise exposure, may also explain why there was great disparity in results from field and laboratory conditions—exposures in captive settings generally exceeded 170 dB before inducing behavioral responses. A summary of some of the relevant material reviewed by Southall *et al.* (2007) is next.

LGL and Greeneridge (1986) and Finley *et al.* (1990) documented belugas and narwhals congregated near ice edges reacting to the approach and passage of icebreaking ships. Beluga whales responded to oncoming vessels by (1) Fleeing at speeds of up to 12.4 mi/hr (20 km/hr) from distances of 12.4–50 mi (20–80 km), (2) abandoning normal pod structure, and (3) modifying vocal behavior and/or emitting alarm calls. Narwhals, in contrast, generally demonstrated a ''freeze'' response, lying motionless or swimming slowly away (as far as 23 mi [37 km] down the ice edge), huddling in groups, and ceasing sound production. There was some evidence of habituation and reduced avoidance 2 to 3 days after onset.

The 1982 season observations by LGL and Greeneridge (1986) involved a single passage of an icebreaker with both ice-based and aerial measurements on June 28, 1982. Four groups of narwhals (n = 9 to 10, 7, 7, and 6) responded when the ship was 4 mi (6.4 km) away (received levels of approximately 100 dB in the 150- to 1,150-Hz band). At a later point, observers sighted belugas moving away from the source at more than 12.4 mi (20 km; received levels of approximately 90 dB in the 150- to 1,150-Hz band). The total number of animals observed fleeing was about 300, suggesting approximately 100 independent groups (of three individuals each). No whales were sighted the following day, but some were sighted on June 30, with ship noise audible at spectrum levels of approximately 55 dB/Hz (up to 4 kHz).

Observations during 1983 (LGL and Greeneridge, 1986) involved two icebreaking ships with aerial survey and ice-based observations during seven sampling periods. Narwhals and belugas generally reacted at received levels ranging from 101 to 121 dB in the 20- to 1,000-Hz band and at a distance of up to 40.4 mi (65 km). Large numbers (100s) of beluga whales moved out of the area at higher received levels. As noise levels from icebreaking operations diminished, a total of 45 narwhals returned to the area and engaged in diving and foraging behavior. During the final sampling period, following an 8-h quiet interval, no reactions were seen from 28 narwhals and 17 belugas (at received levels ranging up to 115 dB).

The final season (1984) reported in LGL and Greeneridge (1986) involved aerial surveys before, during, and after the passage of two icebreaking ships. During operations, no belugas and few narwhals were observed in an area approximately 16.8 mi (27 km) ahead of the vessels, and all whales sighted over 12.4–50 mi (20–80 km) from the ships were swimming strongly away. Additional observations confirmed the spatial extent of avoidance reactions to this sound source in this context.

Buckstaff (2004) reported elevated dolphin whistle rates with received levels from oncoming vessels in the 110 to 120 dB range in Sarasota Bay, Florida. These hearing thresholds were apparently lower than those reported by a researcher listening with towed hydrophones. Morisaka *et al.* (2005) compared whistles from three populations of Indo-Pacific bottlenose dolphins. One population was exposed to vessel noise with spectrum levels of approximately 85 dB/Hz in the 1- to 22-kHz band (broadband received levels approximately 128 dB) as opposed to approximately 65 dB/Hz in the same band (broadband received levels approximately 108 dB) for the other two sites. Dolphin whistles in the noisier environment had lower fundamental frequencies and less frequency modulation, suggesting a shift in sound parameters as a result of increased ambient noise.

Morton and Symonds (2002) used census data on killer whales in British Columbia to evaluate avoidance of non-pulse acoustic harassment devices (AHDs). Avoidance ranges were about 2.5 mi (4 km). Also, there was a dramatic reduction in the number of days ''resident'' killer whales were sighted during AHD-active periods compared to pre- and post-exposure periods and a nearby control site.

Monteiro-Neto *et al.* (2004) studied avoidance responses of tucuxi (*Sotalia fluviatilis*) to Dukane® Netmark acoustic deterrent devices. In a total of 30 exposure trials, approximately five groups each demonstrated significant avoidance compared to 20 pinger off and 55 no-pinger control trials over two quadrats of about 0.19 mi^2 (0.5 km^2). Estimated exposure received levels were approximately 115 dB.

Awbrey and Stewart (1983) played back semi-submersible drillship sounds (source level: 163 dB) to belugas in Alaska. They reported avoidance reactions at 984 and 4,921 ft (300 and 1,500 m) and approach by groups at a distance of 2.2 mi (3.5 km; received levels were approximately 110 to 145 dB over these ranges assuming a 15 log R transmission loss). Similarly, Richardson *et al.* (1990) played back drilling platform sounds (source level: 163 dB) to belugas in Alaska. They conducted aerial observations of eight individuals among approximately 100 spread over an area several hundred meters to several kilometers from the sound source and found no obvious reactions. Moderate changes in movement were noted for three groups swimming within 656 ft (200 m) of the sound projector.

Two studies deal with issues related to changes in marine mammal vocal behavior as a function of variable background noise levels. Foote *et al.* (2004) found increases in the duration of killer whale calls over the period 1977 to 2003, during which time vessel traffic in Puget Sound, and particularly whale-watching boats around the animals, increased dramatically. Scheifele *et al.* (2005) demonstrated that belugas in the St. Lawrence River increased the levels of their vocalizations as a function of the background noise level (the ''Lombard Effect'').

Several researchers conducting laboratory experiments on hearing and the effects of non-pulse sounds on hearing in mid-frequency cetaceans

have reported concurrent behavioral responses. Nachtigall *et al.* (2003) reported that noise exposures up to 179 dB and 55-min duration affected the trained behaviors of a bottlenose dolphin participating in a TTS experiment. Finneran and Schlundt (2004) provided a detailed, comprehensive analysis of the behavioral responses of belugas and bottlenose dolphins to 1-s tones (received levels 160 to 202 dB) in the context of TTS experiments. Romano *et al.* (2004) investigated the physiological responses of a bottlenose dolphin and a beluga exposed to these tonal exposures and demonstrated a decrease in blood cortisol levels during a series of exposures between 130 and 201 dB. Collectively, the laboratory observations suggested the onset of a behavioral response at higher received levels than did field studies. The differences were likely related to the very different conditions and contextual variables between untrained, free-ranging individuals vs. laboratory subjects that were rewarded with food for tolerating noise exposure.

Pinnipeds—Pinnipeds generally seem to be less responsive to exposure to industrial sound than most cetaceans. Pinniped responses to underwater sound from some types of industrial activities such as seismic exploration appear to be temporary and localized (Harris *et al.,* 2001; Reiser *et al.,* 2009).

Blackwell *et al.* (2004) reported little or no reaction of ringed seals in response to pile-driving activities during construction of a man-made island in the Beaufort Sea. Ringed seals were observed swimming as close as 151 ft (46 m) from the island and may have been habituated to the sounds which were likely audible at distances < 9,842 ft (3,000 m) underwater and 0.3 mi (0.5 km) in air. Moulton *et al.* (2003) reported that ringed seal densities on ice in the vicinity of a man-made island in the Beaufort Sea did not change significantly before and after construction and drilling activities.

Southall *et al.* (2007) reviewed literature describing responses of pinnipeds to non-pulsed sound and reported that the limited data suggest exposures between approximately 90 and 140 dB generally do not appear to induce strong behavioral responses in pinnipeds exposed to non-pulse sounds in water; no data exist regarding exposures at higher levels. It is important to note that among these studies, there are some apparent differences in responses between field and laboratory conditions. In contrast to the mid-frequency odontocetes, captive pinnipeds responded more strongly at lower levels than did animals in the field. Again, contextual issues are the likely cause of this difference.

Jacobs and Terhune (2002) observed harbor seal reactions to AHDs (source level in this study was 172 dB) deployed around aquaculture sites. Seals were generally unresponsive to sounds from the AHDs. During two specific events, individuals came within 141 and 144 ft (43 and 44 m) of active AHDs and failed to demonstrate any measurable behavioral response; estimated received levels based on the measures given were approximately 120 to 130 dB.

Costa *et al.* (2003) measured received noise levels from an Acoustic Thermometry of Ocean Climate (ATOC) program sound source off northern California using acoustic data loggers placed on translocated elephant seals. Subjects were captured on land, transported to sea, instrumented with archival acoustic tags, and released such that their transit would lead them near an active ATOC source (at 939-m depth; 75-Hz signal with 37.5-Hz bandwidth; 195 dB maximum source level, ramped up from 165 dB over 20 min) on their return to a haul-out site. Received exposure levels of the ATOC source for experimental subjects averaged 128 dB (range 118 to 137) in the 60- to 90-Hz band. None of the instrumented animals terminated dives or radically altered behavior upon exposure, but some statistically significant changes in diving parameters were documented in nine individuals. Translocated northern elephant seals exposed to this particular non-pulse source began to demonstrate subtle behavioral changes at exposure to received levels of approximately 120 to 140 dB.

Kastelein *et al.* (2006) exposed nine captive harbor seals in an approximately 82 × 98 ft (25 × 30 m) enclosure to non-pulse sounds used in underwater data communication systems (similar to acoustic modems). Test signals were frequency modulated tones, sweeps, and bands of noise with fundamental frequencies between 8 and 16 kHz; 128 to 130 [± 3] dB source levels; 1-to 2-s duration [60–80 percent duty cycle]; or 100 percent duty cycle. They recorded seal positions and the mean number of individual surfacing behaviors during control periods (no exposure), before exposure, and in 15-min experimental sessions (n = 7 exposures for each sound type). Seals generally swam away from each source at received levels of approximately 107 dB, avoiding it by approximately 16 ft (5 m), although they did not haul out of the water or change surfacing behavior. Seal reactions did not appear to wane over repeated exposure (*i.e.,* there was no obvious habituation), and the colony of seals generally returned to baseline conditions following exposure. The seals were not reinforced with food for remaining in the sound field.

Potential effects to pinnipeds from aircraft activity could involve both acoustic and non-acoustic effects. It is uncertain if the seals react to the sound of the helicopter or to its physical presence flying overhead. Typical reactions of hauled out pinnipeds to aircraft that have been observed include looking up at the aircraft, moving on the ice or land, entering a breathing hole or crack in the ice, or entering the water. Ice seals hauled out on the ice have been observed diving into the water when approached by a low-flying aircraft or helicopter (Burns and Harbo, 1972, cited in Richardson *et al.,* 1995a; Burns and Frost, 1979, cited in Richardson *et al.,* 1995a). Richardson *et al.* (1995a) note that responses can vary based on differences in aircraft type, altitude, and flight pattern. Additionally, a study conducted by Born *et al.* (1999) found that wind chill was also a factor in level of response of ringed seals hauled out on ice, as well as time of day and relative wind direction.

Blackwell *et al.* (2004a) observed 12 ringed seals during low-altitude overflights of a Bell 212 helicopter at Northstar in June and July 2000 (9 observations took place concurrent with pipe-driving activities). One seal showed no reaction to the aircraft while the remaining 11 (92%) reacted, either by looking at the helicopter (n=10) or by departing from their basking site (n=1). Blackwell *et al.* (2004a) concluded that none of the reactions to helicopters were strong or long lasting, and that seals near Northstar in June and July 2000 probably had habituated to industrial sounds and visible activities that had occurred often during the preceding winter and spring. There have been few systematic studies of pinniped reactions to aircraft overflights, and most of the available data concern pinnipeds hauled out on land or ice rather than pinnipeds in the water (Richardson *et al.,* 1995a; Born *et al.,* 1999).

Born *et al.* (1999) determined that 49% of ringed seals escaped (*i.e.,* left the ice) as a response to a helicopter flying at 492 ft (150 m) altitude. Seals entered the water when the helicopter was 4,101 ft (1,250 m) away if the seal was in front of the helicopter and at 1,640 ft (500 m) away if the seal was to the side of the helicopter. The authors noted that more seals reacted to helicopters than to fixed-wing aircraft. The study concluded that the risk of scaring ringed

seals by small-type helicopters could be substantially reduced if they do not approach closer than 4,921 ft (1,500 m).

Spotted seals hauled out on land in summer are unusually sensitive to aircraft overflights compared to other species. They often rush into the water when an aircraft flies by at altitudes up to 984–2,461 ft (300–750 m). They occasionally react to aircraft flying as high as 4,495 ft (1,370 m) and at lateral distances as far as 1.2 mi (2 km) or more (Frost and Lowry, 1990; Rugh *et al.,* 1997).

(4) Hearing Impairment and Other Physiological Effects

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very strong sounds. Non-auditory physiological effects might also occur in marine mammals exposed to strong underwater sound. Possible types of non-auditory physiological effects or injuries that theoretically might occur in mammals close to a strong sound source include stress, neurological effects, bubble formation, and other types of organ or tissue damage. It is possible that some marine mammal species (*i.e.,* beaked whales) may be especially susceptible to injury and/or stranding when exposed to strong pulsed sounds. However, as discussed later in this document, there is no definitive evidence that any of these effects occur even for marine mammals in close proximity to industrial sound sources, and beaked whales do not occur in the proposed activity area. Additional information regarding the possibilities of TTS, permanent threshold shift (PTS), and non-auditory physiological effects, such as stress, is discussed for both exploratory drilling activities and ZVSP surveys in the next subsection (''*Potential Effects from ZVSP Activities''*).

Potential Effects From ZVSP Activities

(1) Tolerance

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. Weir (2008) observed marine mammal responses to seismic pulses from a 24 airgun array firing a total volume of either 5,085 in^3 or 3,147 in^3 in Angolan waters between August 2004 and May 2005. Weir recorded a total of 207 sightings of humpback whales (n = 66), sperm whales (n = 124), and Atlantic spotted dolphins (n = 17) and reported that there were no significant differences in encounter rates (sightings/hr) for humpback and sperm whales according to the airgun array's operational status (*i.e.,* active versus silent). For additional information on tolerance of marine mammals to anthropogenic sound, see the previous subsection in this document (''*Potential Effects from Exploratory Drilling Activities''*).

(2) Masking

As stated earlier in this document, masking is the obscuring of sounds of interest by other sounds, often at similar frequencies. For full details about masking, see the previous subsection in this document (''*Potential Effects from Exploratory Drilling Activities''*). Some additional information regarding pulsed sounds is provided here.

There is evidence of some marine mammal species continuing to call in the presence of industrial activity. McDonald *et al.* (1995) heard blue and fin whale calls between seismic pulses in the Pacific. Although there has been one report that sperm whales cease calling when exposed to pulses from a very distant seismic ship (Bowles *et al.,* 1994), a more recent study reported that sperm whales off northern Norway continued calling in the presence of seismic pulses (Madsen *et al.,* 2002). Similar results were also reported during work in the Gulf of Mexico (Tyack *et al.,* 2003). Bowhead whale calls are frequently detected in the presence of seismic pulses, although the numbers of calls detected may sometimes be reduced (Richardson *et al.,* 1986; Greene *et al.,* 1999; Blackwell *et al.,* 2009a). Bowhead whales in the Beaufort Sea may decrease their call rates in response to seismic operations, although movement out of the area might also have contributed to the lower call detection rate (Blackwell *et al.,* 2009a,b). Additionally, there is increasing evidence that, at times, there is enough reverberation between airgun pulses such that detection range of calls may be significantly reduced. In contrast, Di Iorio and Clark (2009) found evidence of increased calling by blue whales during operations by a lower-energy seismic source, a sparker.

There is little concern regarding masking due to the brief duration of these pulses and relatively longer silence between airgun shots (9–12 seconds) near the sound source. However, at long distances (over tens of kilometers away) in deep water, due to multipath propagation and reverberation, the durations of airgun pulses can be ''stretched'' to seconds with long decays (Madsen *et al.,* 2006; Clark and Gagnon, 2006). Therefore it could affect communication signals used by low frequency mysticetes when they occur near the noise band and thus reduce the communication space of animals (*e.g.,* Clark *et al.,* 2009a,b) and cause increased stress levels (*e.g.,* Foote *et al.,* 2004; Holt *et al.,* 2009). Nevertheless, the intensity of the noise is also greatly reduced at long distances. Therefore, masking effects are anticipated to be limited, especially in the case of odontocetes, given that they typically communicate at frequencies higher than those of the airguns.

(3) Behavioral Disturbance Reactions

As was described in more detail in the previous sub-section (''*Potential Effects of Exploratory Drilling Activities''*), behavioral responses to sound are highly variable and context-specific. Summaries of observed reactions and studies are provided next.

Baleen Whales—Baleen whale responses to pulsed sound (*e.g.,* seismic airguns) have been studied more thoroughly than responses to continuous sound (*e.g.,* drillships). Baleen whales generally tend to avoid operating airguns, but avoidance radii are quite variable. Whales are often reported to show no overt reactions to pulses from large arrays of airguns at distances beyond a few kilometers, even though the airgun pulses remain well above ambient noise levels out to much greater distances (Miller *et al.,* 2005). However, baleen whales exposed to strong noise pulses often react by deviating from their normal migration route (Richardson *et al.,* 1999). Migrating gray and bowhead whales were observed avoiding the sound source by displacing their migration route to varying degrees but within the natural boundaries of the migration corridors (Schick and Urban, 2000; Richardson *et al.,* 1999; Malme *et al.,* 1983). Baleen whale responses to pulsed sound however may depend on the type of activity in which the whales are engaged. Some evidence suggests that feeding bowhead whales may be more tolerant of underwater sound than migrating bowheads (Miller *et al.,* 2005; Lyons *et al.,* 2009; Christie *et al.,* 2010).

Results of studies of gray, bowhead, and humpback whales have determined that received levels of pulses in the 160–170 dB re 1 μPa rms range seem to cause obvious avoidance behavior in a substantial fraction of the animals exposed. In many areas, seismic pulses from large arrays of airguns diminish to those levels at distances ranging from 2.8–9 mi (4.5–14.5 km) from the source. For the much smaller airgun array used during the ZVSP survey (total discharge volume of 760 in^3), distances to received levels in the 170–160 dB re 1 μPa rms range are estimated to be 1.44–

2.28 mi (2.31–3.67 km). Baleen whales within those distances may show avoidance or other strong disturbance reactions to the airgun array. Subtle behavioral changes sometimes become evident at somewhat lower received levels, and recent studies have shown that some species of baleen whales, notably bowhead and humpback whales, at times show strong avoidance at received levels lower than 160–170 dB re 1 µPa rms. Bowhead whales migrating west across the Alaskan Beaufort Sea in autumn, in particular, are unusually responsive, with avoidance occurring out to distances of 12.4–18.6 mi (20–30 km) from a medium-sized airgun source (Miller *et al.,* 1999; Richardson *et al.,* 1999). However, more recent research on bowhead whales (Miller *et al.,* 2005) corroborates earlier evidence that, during the summer feeding season, bowheads are not as sensitive to seismic sources. In summer, bowheads typically begin to show avoidance reactions at a received level of about 160–170 dB re 1 µPa rms (Richardson *et al.,* 1986; Ljungblad *et al.,* 1988; Miller *et al.,* 2005).

Malme *et al.* (1986, 1988) studied the responses of feeding eastern gray whales to pulses from a single 100 in^3 airgun off St. Lawrence Island in the northern Bering Sea. They estimated, based on small sample sizes, that 50% of feeding gray whales ceased feeding at an average received pressure level of 173 dB re 1 µPa on an (approximate) rms basis, and that 10% of feeding whales interrupted feeding at received levels of 163 dB. Those findings were generally consistent with the results of experiments conducted on larger numbers of gray whales that were migrating along the California coast and on observations of the distribution of feeding Western Pacific gray whales off Sakhalin Island, Russia, during a seismic survey (Yazvenko *et al.,* 2007). Data on short-term reactions (or lack of reactions) of cetaceans to impulsive noises do not necessarily provide information about long-term effects. While it is not certain whether impulsive noises affect reproductive rate or distribution and habitat use in subsequent days or years, certain species have continued to use areas ensonified by airguns and have continued to increase in number despite successive years of anthropogenic activity in the area. Gray whales continued to migrate annually along the west coast of North America despite intermittent seismic exploration and much ship traffic in that area for decades (Appendix A in Malme *et al.,* 1984). Bowhead whales continued to travel to the eastern Beaufort Sea each summer despite seismic exploration in their summer and autumn range for many years (Richardson *et al.,* 1987). Populations of both gray whales and bowhead whales grew substantially during this time. Bowhead whales have increased by approximately 3.4% per year for the last 10 years in the Beaufort Sea (Allen and Angliss, 2011). In any event, the brief exposures to sound pulses from the proposed airgun source (the airguns will only be fired for a period of 10–14 hours for each of the two wells) are highly unlikely to result in prolonged effects.

Toothed Whales—Few systematic data are available describing reactions of toothed whales to noise pulses. Few studies similar to the more extensive baleen whale/seismic pulse work summarized earlier in this document have been reported for toothed whales. However, systematic work on sperm whales is underway (Tyack *et al.,* 2003), and there is an increasing amount of information about responses of various odontocetes to seismic surveys based on monitoring studies (*e.g.,* Stone, 2003; Smultea *et al.,* 2004; Moulton and Miller, 2005).

Seismic operators and marine mammal observers sometimes see dolphins and other small toothed whales near operating airgun arrays, but, in general, there seems to be a tendency for most delphinids to show some limited avoidance of seismic vessels operating large airgun systems. However, some dolphins seem to be attracted to the seismic vessel and floats, and some ride the bow wave of the seismic vessel even when large arrays of airguns are firing. Nonetheless, there have been indications that small toothed whales sometimes move away or maintain a somewhat greater distance from the vessel when a large array of airguns is operating than when it is silent (*e.g.,* Goold, 1996a,b,c; Calambokidis and Osmek, 1998; Stone, 2003). The beluga may be a species that (at least at times) shows long-distance avoidance of seismic vessels. Aerial surveys during seismic operations in the southeastern Beaufort Sea recorded much lower sighting rates of beluga whales within 6.2–12.4 mi (10–20 km) of an active seismic vessel. These results were consistent with the low number of beluga sightings reported by observers aboard the seismic vessel, suggesting that some belugas might be avoiding the seismic operations at distances of 6.2–12.4 mi (10–20 km) (Miller *et al.,* 2005).

Captive bottlenose dolphins and (of more relevance in this project) beluga whales exhibit changes in behavior when exposed to strong pulsed sounds similar in duration to those typically used in seismic surveys (Finneran *et al.,* 2002, 2005). However, the animals tolerated high received levels of sound (pk-pk level > 200 dB re 1 µPa) before exhibiting aversive behaviors.

Reactions of toothed whales to large arrays of airguns are variable and, at least for delphinids, seem to be confined to a smaller radius than has been observed for mysticetes. However, based on the limited existing evidence, belugas should not be grouped with delphinids in the ''less responsive'' category.

Pinnipeds—Pinnipeds are not likely to show a strong avoidance reaction to the airgun sources proposed for use. Visual monitoring from seismic vessels has shown only slight (if any) avoidance of airguns by pinnipeds and only slight (if any) changes in behavior. Ringed seals frequently do not avoid the area within a few hundred meters of operating airgun arrays (Harris *et al.,* 2001; Moulton and Lawson, 2002; Miller *et al.,* 2005). Monitoring work in the Alaskan Beaufort Sea during 1996–2001 provided considerable information regarding the behavior of seals exposed to seismic pulses (Harris *et al.,* 2001; Moulton and Lawson, 2002). These seismic projects usually involved arrays of 6 to 16 airguns with total volumes of 560 to 1,500 in^3. The combined results suggest that some seals avoid the immediate area around seismic vessels. In most survey years, ringed seal sightings tended to be farther away from the seismic vessel when the airguns were operating than when they were not (Moulton and Lawson, 2002). However, these avoidance movements were relatively small, on the order of 328 ft (100 m) to a few hundreds of meters, and many seals remained within 328–656 ft (100–200 m) of the trackline as the operating airgun array passed by. Seal sighting rates at the water surface were lower during airgun array operations than during no-airgun periods in each survey year except 1997. Similarly, seals are often very tolerant of pulsed sounds from seal-scaring devices (Mate and Harvey, 1987; Jefferson and Curry, 1994; Richardson *et al.,* 1995a). However, initial telemetry work suggests that avoidance and other behavioral reactions by two other species of seals to small airgun sources may at times be stronger than evident to date from visual studies of pinniped reactions to airguns (Thompson *et al.,* 1998). Even if reactions of the species occurring in the present study area are as strong as those evident in the telemetry study, reactions are expected to be confined to relatively small

distances and durations, with no long-term effects on pinniped individuals or populations. Additionally, the airguns are only proposed to be used for a short time during the exploration drilling program (approximately 10–14 hours for each well, for a total of 20–28 hours over the entire open-water season, which lasts for approximately 4 months).

(4) Hearing Impairment and Other Physiological Effects

TTS—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days, can be limited to a particular frequency range, and can be in varying degrees (*i.e.,* a loss of a certain number of dBs of sensitivity). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound.

Marine mammal hearing plays a critical role in communication with conspecifics and in interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during a time when communication is critical for successful mother/calf interactions could have more serious impacts if it were in the same frequency band as the necessary vocalizations and of a severity that it impeded communication. The fact that animals exposed to levels and durations of sound that would be expected to result in this physiological response would also be expected to have behavioral responses of a comparatively more severe or sustained nature is also notable and potentially of more importance than the simple existence of a TTS.

Researchers have derived TTS information for odontocetes from studies on the bottlenose dolphin and beluga. For the one harbor porpoise tested, the received level of airgun sound that elicited onset of TTS was lower (Lucke *et al.,* 2009). If these results from a single animal are representative, it is inappropriate to assume that onset of TTS occurs at similar received levels in all odontocetes (*cf.* Southall *et al.,* 2007). Some cetaceans apparently can incur TTS at considerably lower sound exposures than are necessary to elicit TTS in the beluga or bottlenose dolphin.

For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. The frequencies to which baleen whales are most sensitive are assumed to be lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004), meaning that baleen whales require sounds to be louder (*i.e.,* higher dB levels) than odontocetes in the frequency ranges at which each group hears the best. From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales (Southall *et al.,* 2007). Since current NMFS practice assumes the same thresholds for the onset of hearing impairment in both odontocetes and mysticetes, NMFS' onset of TTS threshold is likely conservative for mysticetes. For this proposed activity, Shell expects no cases of TTS given the strong likelihood that baleen whales would avoid the airguns before being exposed to levels high enough for TTS to occur. The source levels of the drillship are far lower than those of the airguns.

In pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. However, systematic TTS studies on captive pinnipeds have been conducted (Bowles *et al.,* 1999; Kastak *et al.,* 1999, 2005, 2007; Schusterman *et al.,* 2000; Finneran *et al.,* 2003; Southall *et al.,* 2007). Initial evidence from more prolonged (non-pulse) exposures suggested that some pinnipeds (harbor seals in particular) incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.,* 1999, 2005; Ketten *et al.,* 2001; cf. Au *et al.,* 2000). The TTS threshold for pulsed sounds has been indirectly estimated as being a sound exposure level (SEL) of approximately 171 dB re 1 $\mu Pa^2 \cdot s$ (Southall *et al.,* 2007) which would be equivalent to a single pulse with a received level of approximately 181 to 186 dB re 1 µPa (rms), or a series of pulses for which the highest rms values are a few dB lower. Corresponding values for California sea lions and northern elephant seals are likely to be higher (Kastak *et al.,* 2005). For harbor seal, which is closely related to the ringed seal, TTS onset apparently occurs at somewhat lower received energy levels than for odonotocetes. The sound level necessary to cause TTS in pinnipeds depends on exposure duration, as in other mammals; with longer exposure, the level necessary to elicit TTS is reduced (Schusterman *et al.,* 2000; Kastak *et al.,* 2005, 2007). For very short exposures (*e.g.,* to a single sound pulse), the level necessary to cause TTS is very high (Finneran *et al.,* 2003). For pinnipeds exposed to in-air sounds, auditory fatigue has been measured in response to single pulses and to non-pulse noise (Southall *et al.,* 2007), although high exposure levels were required to induce TTS-onset (SEL: 129 dB re: 20 $\mu Pa^2 \cdot s$; Bowles *et al.,* unpub. data).

NMFS has established acoustic thresholds that identify the received sound levels above which hearing impairment or other injury could potentially occur, which are 180 and 190 dB re 1 µPa (rms) for cetaceans and pinnipeds, respectively (NMFS 1995, 2000). The established 180- and 190-dB re 1 µPa (rms) criteria are the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before additional TTS measurements for marine mammals became available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. TTS is considered by NMFS to be a type of Level B (non-injurious) harassment. The 180- and 190-dB levels are shutdown criteria applicable to cetaceans and pinnipeds, respectively, as specified by NMFS (2000) and are used to establish exclusion zones (EZs), as appropriate. Additionally, based on the summary provided here and the fact that modeling indicates the back-propagated source level for the *Kulluk* to be 185 dB re 1 µPa at 1 m (Greene, 1987) and for the *Discoverer* to be between 177 and 185 dB re 1 µPa at 1 m (Austin and Warner, 2010), TTS is not expected to occur in any marine mammal species

that may occur in the proposed drilling area since the source level will not reach levels thought to induce even mild TTS. While the source level of the airgun is higher than the 190-dB threshold level, an animal would have to be in very close proximity to be exposed to such levels. Additionally, the 180- and 190-dB radii for the airgun are 0.8 mi (1.24 km) and 0.3 mi (524 m), respectively, from the source. Because of the short duration that the airguns will be used (no more than 20–28 hours throughout the entire open-water season) and mitigation and monitoring measures described later in this document, hearing impairment is not anticipated.

PTS—When PTS occurs, there is physical damage to the sound receptors in the ear. In some cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985).

There is no specific evidence that exposure to underwater industrial sound associated with oil exploration can cause PTS in any marine mammal (see Southall *et al.,* 2007). However, given the possibility that mammals might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to such activities might incur PTS (*e.g.,* Richardson *et al.,* 1995, p. 372*ff;* Gedamke *et al.,* 2008). Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage in terrestrial mammals. Relationships between TTS and PTS thresholds have not been studied in marine mammals but are assumed to be similar to those in humans and other terrestrial mammals (Southall *et al.,* 2007; Le Prell, in press). PTS might occur at a received sound level at least several decibels above that inducing mild TTS. Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as airgun pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis and probably greater than 6 dB (Southall *et al.,* 2007).

It is highly unlikely that marine mammals could receive sounds strong enough (and over a sufficient duration) to cause PTS during the proposed exploratory drilling program. As mentioned previously in this document, the source levels of the drillship are not considered strong enough to cause even slight TTS. Given the higher level of sound necessary to cause PTS, it is even less likely that PTS could occur. In fact, based on the modeled source levels for the drillship, the levels immediately adjacent to the drillship may not be sufficient to induce PTS, even if the animals remain in the immediate vicinity of the activity. The modeled source levels from the *Kulluk* and *Discoverer* suggest that marine mammals located immediately adjacent to a drillship would likely not be exposed to received sound levels of a magnitude strong enough to induce PTS, even if the animals remain in the immediate vicinity of the proposed activity location for a prolonged period of time. Because the source levels do not reach the threshold of 190 dB currently used for pinnipeds and is at the 180 dB threshold currently used for cetaceans, it is highly unlikely that any type of hearing impairment, temporary or permanent, would occur as a result of the exploration drilling activities. Additionally, Southall *et al.* (2007) proposed that the thresholds for injury of marine mammals exposed to ''discrete'' noise events (either single or multiple exposures over a 24-hr period) are higher than the 180- and 190-dB re 1 µPa (rms) in-water threshold currently used by NMFS. Table 1 in this document summarizes the SPL and SEL levels thought to cause auditory injury to cetaceans and pinnipeds in-water. For more information, please refer to Southall *et al.* (2007).

TABLE 1—PROPOSED INJURY CRITERIA FOR CETACEANS AND PINNIPEDS EXPOSED TO ''DISCRETE'' NOISE EVENTS (EITHER SINGLE PULSES, MULTIPLE PULSES, OR NON-PULSES WITHIN A 24-HR PERIOD; SOUTHALL ET AL., 2007)

	Single pulses	Multiple pulses	Non-pulses
Low-frequency cetaceans			
Sound pressure level	230 dB re 1 µPa (peak) (flat)	230 dB re 1 µPa (peak) (flat)	230 dB re 1 µPa (peak) (flat).
Sound exposure level	198 dB re 1 $\mu Pa^2 \cdot s$ (M_{lf})	198 dB re 1 $\mu Pa^2 \cdot s$ (M_{lf})	215 dB re 1 $\mu Pa^2 \cdot s$ (M_{lf}).
Mid-frequency cetaceans			
Sound pressure level	230 dB re 1 µPa (peak) (flat)	230 dB re 1 µPa (peak) (flat)	230 dB re 1 µPa (peak) (flat).
Sound exposure level	198 dB re 1 $\mu Pa^2 \cdot s$ (M_{lf})	198 dB re 1 $\mu Pa^2 \cdot s$ (M_{lf})	215 dB re 1 $\mu Pa^2 \cdot s$ (M_{lf}).
High-frequency cetaceans			
Sound pressure level	230 dB re 1 µPa (peak) (flat)	230 dB re 1 µPa (peak) (flat)	230 dB re 1 µPa (peak) (flat).
Sound exposure level	198 dB re 1 $\mu Pa^2 \cdot s$ (M_{lf})	198 dB re 1 $\mu Pa^2 \cdot s$ (M_{lf})	215 dB re 1 $\mu Pa^2 \cdot s$ (M_{lf}).
Pinnipeds (in water)			
Sound pressure level	218 dB re 1 µPa (peak) (flat)	218 dB re 1 µPa (peak) (flat)	218 dB re 1 µPa (peak) (flat).
Sound exposure level	186 dB re 1 $\mu Pa^2 \cdot s$ (M_{pw})	186 dB re 1 $\mu Pa^2 \cdot s$ (M_{pw})	203 dB re 1 $\mu Pa^2 \cdot s$ (M_{pw}).

Non-auditory Physiological Effects—Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007). Studies examining any such effects are limited. If any such effects do occur, they probably would be limited to unusual situations when animals might be exposed at close range for unusually long periods. It is doubtful that any single marine mammal would be exposed to strong sounds for sufficiently long that significant physiological stress would develop.

Classic stress responses begin when an animal's central nervous system perceives a potential threat to its homeostasis. That perception triggers stress responses regardless of whether a stimulus actually threatens the animal; the mere perception of a threat is sufficient to trigger a stress response (Moberg, 2000; Sapolsky *et al.,* 2005;

Seyle, 1950). Once an animal's central nervous system perceives a threat, it mounts a biological response or defense that consists of a combination of the four general biological defense responses: Behavioral responses; autonomic nervous system responses; neuroendocrine responses; or immune responses.

In the case of many stressors, an animal's first and most economical (in terms of biotic costs) response is behavioral avoidance of the potential stressor or avoidance of continued exposure to a stressor. An animal's second line of defense to stressors involves the sympathetic part of the autonomic nervous system and the classical ''fight or flight'' response, which includes the cardiovascular system, the gastrointestinal system, the exocrine glands, and the adrenal medulla to produce changes in heart rate, blood pressure, and gastrointestinal activity that humans commonly associate with ''stress.'' These responses have a relatively short duration and may or may not have significant long-term effects on an animal's welfare.

An animal's third line of defense to stressors involves its neuroendocrine or sympathetic nervous systems; the system that has received the most study has been the hypothalmus-pituitary-adrenal system (also known as the HPA axis in mammals or the hypothalamus-pituitary-interrenal axis in fish and some reptiles). Unlike stress responses associated with the autonomic nervous system, virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction (Moberg, 1987; Rivier, 1995), altered metabolism (Elasser *et al.,* 2000), reduced immune competence (Blecha, 2000), and behavioral disturbance. Increases in the circulation of glucocorticosteroids (cortisol, corticosterone, and aldosterone in marine mammals; see Romano *et al.,* 2004) have been equated with stress for many years.

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and distress is the biotic cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose a risk to the animal's welfare. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other biotic functions, which impair those functions that experience the diversion. For example, when mounting a stress response diverts energy away from growth in young animals, those animals may experience stunted growth. When mounting a stress response diverts energy from a fetus, an animal's reproductive success and fitness will suffer. In these cases, the animals will have entered a pre-pathological or pathological state which is called ''distress'' (sensu Seyle, 1950) or ''allostatic loading'' (sensu McEwen and Wingfield, 2003). This pathological state will last until the animal replenishes its biotic reserves sufficient to restore normal function. Note that these examples involved a long-term (days or weeks) stress response exposure to stimuli.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses have also been documented fairly well through controlled experiment; because this physiology exists in every vertebrate that has been studied, it is not surprising that stress responses and their costs have been documented in both laboratory and free-living animals (for examples see, Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005; Reneerkens *et al.,* 2002; Thompson and Hamer, 2000). Although no information has been collected on the physiological responses of marine mammals to anthropogenic sound exposure, studies of other marine animals and terrestrial animals would lead us to expect some marine mammals to experience physiological stress responses and, perhaps, physiological responses that would be classified as ''distress'' upon exposure to anthropogenic sounds.

For example, Jansen (1998) reported on the relationship between acoustic exposures and physiological responses that are indicative of stress responses in humans (*e.g.,* elevated respiration and increased heart rates). Jones (1998) reported on reductions in human performance when faced with acute, repetitive exposures to acoustic disturbance. Trimper *et al.* (1998) reported on the physiological stress responses of osprey to low-level aircraft noise while Krausman *et al.* (2004) reported on the auditory and physiology stress responses of endangered Sonoran pronghorn to military overflights. Smith *et al.* (2004a, 2004b) identified noise-induced physiological transient stress responses in hearing-specialist fish (*i.e.,* goldfish) that accompanied short- and long-term hearing losses. Welch and Welch (1970) reported physiological and behavioral stress responses that accompanied damage to the inner ears of fish and several mammals.

Hearing is one of the primary senses marine mammals use to gather information about their environment and communicate with conspecifics. Although empirical information on the relationship between sensory impairment (TTS, PTS, and acoustic masking) on marine mammals remains limited, it seems reasonable to assume that reducing an animal's ability to gather information about its environment and to communicate with other members of its species would be stressful for animals that use hearing as their primary sensory mechanism. Therefore, we assume that acoustic exposures sufficient to trigger onset PTS or TTS would be accompanied by physiological stress responses because terrestrial animals exhibit those responses under similar conditions (NRC, 2003). More importantly, marine mammals might experience stress responses at received levels lower than those necessary to trigger onset TTS. Based on empirical studies of the time required to recover from stress responses (Moberg, 2000), NMFS also assumes that stress responses could persist beyond the time interval required for animals to recover from TTS and might result in pathological and pre-pathological states that would be as significant as behavioral responses to TTS. However, as stated previously in this document, the source levels of the drillships are not loud enough to induce PTS or likely even TTS.

Resonance effects (Gentry, 2002) and direct noise-induced bubble formations (Crum *et al.,* 2005) are implausible in the case of exposure to an impulsive broadband source like an airgun array. If seismic surveys disrupt diving patterns of deep-diving species, this might result in bubble formation and a form of the bends, as speculated to occur in beaked whales exposed to sonar. However, there is no specific evidence of this upon exposure to airgun pulses. Additionally, no beaked whale species occur in the proposed exploration drilling area.

In general, very little is known about the potential for strong, anthropogenic underwater sounds to cause non-auditory physical effects in marine mammals. Such effects, if they occur at all, would presumably be limited to short distances and to activities that extend over a prolonged period. The available data do not allow identification of a specific exposure level above which non-auditory effects

can be expected (Southall *et al.,* 2007) or any meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. The low levels of continuous sound that will be produced by the drillship are not expected to cause such effects. Additionally, marine mammals that show behavioral avoidance of the proposed activities, including most baleen whales, some odontocetes (including belugas), and some pinnipeds, are especially unlikely to incur auditory impairment or other physical effects.

Stranding and Mortality

Marine mammals close to underwater detonations of high explosives can be killed or severely injured, and the auditory organs are especially susceptible to injury (Ketten *et al.,* 1993; Ketten, 1995). However, explosives are no longer used for marine waters for commercial seismic surveys; they have been replaced entirely by airguns or related non-explosive pulse generators. Underwater sound from drilling, support activities, and airgun arrays is less energetic and has slower rise times, and there is no proof that they can cause serious injury, death, or stranding, even in the case of large airgun arrays. However, the association of mass strandings of beaked whales with naval exercises involving mid-frequency active sonar, and, in one case, a Lamont-Doherty Earth Observatory (L–DEO) seismic survey (Malakoff, 2002; Cox *et al.,* 2006), has raised the possibility that beaked whales exposed to strong pulsed sounds may be especially susceptible to injury and/or behavioral reactions that can lead to stranding (*e.g.,* Hildebrand, 2005; Southall *et al.,* 2007).

Specific sound-related processes that lead to strandings and mortality are not well documented, but may include:

(1) Swimming in avoidance of a sound into shallow water;

(2) A change in behavior (such as a change in diving behavior) that might contribute to tissue damage, gas bubble formation, hypoxia, cardiac arrhythmia, hypertensive hemorrhage or other forms of trauma;

(3) A physiological change, such as a vestibular response leading to a behavioral change or stress-induced hemorrhagic diathesis, leading in turn to tissue damage; and

(4) Tissue damage directly from sound exposure, such as through acoustically-mediated bubble formation and growth or acoustic resonance of tissues.

Some of these mechanisms are unlikely to apply in the case of impulse sounds. However, there are indications that gas-bubble disease (analogous to ''the bends''), induced in supersaturated tissue by a behavioral response to acoustic exposure, could be a pathologic mechanism for the strandings and mortality of some deep-diving cetaceans exposed to sonar. However, the evidence for this remains circumstantial and is associated with exposure to naval mid-frequency sonar, not seismic surveys or exploratory drilling programs (Cox *et al.,* 2006; Southall *et al.,* 2007).

Both seismic pulses and continuous drillship sounds are quite different from mid-frequency sonar signals, and some mechanisms by which sonar sounds have been hypothesized to affect beaked whales are unlikely to apply to airgun pulses or drillships. Sounds produced by airgun arrays are broadband impulses with most of the energy below 1 kHz, and the low-energy continuous sounds produced by drillships have most of the energy between 20 and 1,000 Hz. Additionally, the non-impulsive, continuous sounds produced by the drillship proposed to be used by Shell do not have rapid rise times. Rise time is the fluctuation in sound levels of the source. The type of sound that would be produced during the proposed drilling program will be constant and will not exhibit any sudden fluctuations or changes. Typical military mid-frequency sonar emits non-impulse sounds at frequencies of 2–10 kHz, generally with a relatively narrow bandwidth at any one time. A further difference between them is that naval exercises can involve sound sources on more than one vessel. Thus, it is not appropriate to assume that there is a direct connection between the effects of military sonar and oil and gas industry operations on marine mammals. However, evidence that sonar signals can, in special circumstances, lead (at least indirectly) to physical damage and mortality (*e.g.,* Balcomb and Claridge, 2001; NOAA and USN, 2001; Jepson *et al.,* 2003; Fernández *et al.,* 2004, 2005; Hildebrand, 2005; Cox *et al.,* 2006) suggests that caution is warranted when dealing with exposure of marine mammals to any high-intensity ''pulsed'' sound.

There is no conclusive evidence of cetacean strandings or deaths at sea as a result of exposure to seismic surveys, but a few cases of strandings in the general area where a seismic survey was ongoing have led to speculation concerning a possible link between seismic surveys and strandings. Suggestions that there was a link between seismic surveys and strandings of humpback whales in Brazil (Engel *et al.,* 2004) were not well founded (IAGC, 2004; IWC, 2007). In September 2002, there was a stranding of two Cuvier's beaked whales in the Gulf of California, Mexico, when the L–DEO vessel R/V *Maurice Ewing* was operating a 20 airgun (8,490 in^3) array in the general area. The link between the stranding and the seismic surveys was inconclusive and not based on any physical evidence (Hogarth, 2002; Yoder, 2002). Nonetheless, the Gulf of California incident, plus the beaked whale strandings near naval exercises involving use of mid-frequency sonar, suggests a need for caution in conducting seismic surveys in areas occupied by beaked whales until more is known about effects of seismic surveys on those species (Hildebrand, 2005). No injuries of beaked whales are anticipated during the proposed exploratory drilling program because none occur in the proposed area.

Exploratory Drilling Program and Potential for Oil Spill

As noted above, the specified activity involves the drilling of exploratory wells and associated activities in the Beaufort Sea during the 2012 open-water season. The impacts to marine mammals that are reasonably expected to occur will be acoustic in nature. In response to previous IHA applications submitted by Shell, various entities have asserted that NMFS cannot authorize the take of marine mammals incidental to exploratory drilling under an IHA. Instead, they contend that incidental take can be allowed only with a letter of authorization (LOA) issued under five-year regulations because of the potential that an oil spill will cause serious injury or mortality.

There are two avenues for authorizing incidental take of marine mammals under the MMPA. NMFS may, depending on the nature of the anticipated take, authorize the take of marine mammals incidental to a specified activity through regulations and LOAs or annual IHAs. *See* 16 U.S.C. 1371(a)(5)(A) and (D). In general, regulations (accompanied by LOAs) may be issued for any type of take (*e.g.,* Level B harassment (behavioral disturbance), Level A harassment (injury), serious injury, or mortality), whereas IHAs are limited to activities that result only in harassment (*e.g.,* behavioral disturbance or injury). Following the 1994 MMPA Amendments, NMFS promulgated implementing regulations governing the issuance of IHAs in Arctic waters. *See* 60 FR 28379 (May 31, 1995) and 61 FR 15884 (April 10, 1996). NMFS stated in the preamble of the proposed rulemaking that the scope of IHAs would be limited to ''* * * those authorizations for harassment involving incidental harassment that may involve *non-serious injury.*'' *See* 60 FR 28380

(May 31, 1995; emphasis added); 50 CFR 216.107(a). (''[e]xcept for activities that have the potential to result in serious injury or mortality, which must be authorized under 216.105, incidental harassment authorizations may be issued, * * * to allowed activities that may result in only the incidental harassment of a small number of marine mammals.''). NMFS explained further that applications would be reviewed to determine whether the activity would result in more than harassment and if so, the agency would either (1) Attempt to negate the potential for serious injury through mitigation requirements, or (2) deny the incidental harassment authorization and require the applicant to apply for incidental take regulations. *See id.* at 28380–81.

NMFS' determination of whether the type of incidental take authorization requested is appropriate occurs shortly after the applicant submits an application for an incidental take authorization. The agency evaluates the proposed action and all information contained in the application to determine whether it is adequate and complete and whether the type of taking requested is appropriate. *See* 50 CFR 216.104; *see also* 60 FR 28380 (May 31, 1995). Among other things, NMFS considers the specific activity or class of activities that can reasonably be *expected* to result in incidental take; the *type* of incidental take authorization that is being requested; and the *anticipated* impact of the activity upon the species or stock and its habitat. *See id.* at 216.104(a). (emphasis added). Any application that is determined to be incomplete or inappropriate for the type of taking requested will be returned to the applicant with an explanation of why the application is being returned. *See id.* Finally, NMFS evaluates the best available science to determine whether a proposed activity is reasonably expected or likely to result in serious injury or mortality.

NMFS evaluated Shell's incidental take application for its proposed 2012 drilling activities in light of the foregoing criteria and has concluded that Shell's request for an IHA is warranted. Shell submitted information with its IHA Application indicating that an oil spill (large or very large oil spill) is highly unlikely and thus not reasonably expected to occur during the course of exploration drilling or ZVSP surveys. *See* Camden Bay IHA Application, pp. 3 and Attachment E—Analysis of the Probability of an ''Unspecified Activity'' and Its Impacts: Oil Spill. In addition, Shell's 2012 Exploration Plan, which was conditionally approved by the Department of the Interior, indicates there is a ''very low likelihood of a large oil spill event''. *See* Shell Offshore, Inc.'s Revised Outer Continental Shelf Lease Exploration Plan, Camden Bay, Beaufort Sea, Alaska (May 2011), at p. 8–1; *see also,* Appendix F to Shell's Revised Outer Continental Shelf Lease Exploration Plan, at p. 4–174; *see also,* Beaufort Sea Planning Area Environmental Assessment for Shell Offshore, Inc.'s 2012 Revised Outer Continental Shelf Lease Exploration Plan (August 2011).

The likelihood of a large or very large (*i.e.* ≥1,000 barrels or ≥150,000 barrels, respectively) oil spill occurring during Shell's proposed program has been estimated to be low. A total of 35 exploration wells have been drilled between 1982 and 2003 in the Chukchi and Beaufort seas, and there have been no blowouts. In addition, no blowouts have occurred from the approximately 98 exploration wells drilled within the Alaskan OCS (MMS, 2007a; BOEMRE, 2011). Attachment E in Shell's IHA Application contains information regarding the probability of an oil spill occurring during the proposed program and the potential impacts should one occur. Based on modeling conducted by Bercha (2008), the predicted frequency of an exploration well oil spill in waters similar to those in Camden Bay, Beaufort Sea, Alaska, is 0.000612 per well for a blowout sized between 10,000 barrels (bbl) to 149,000 bbl and 0.000354 per well for a blowout greater than 150,000 bbl. Please refer to Shell's application for additional information on the model and predicted frequencies (see **ADDRESSES**).

Shell has implemented several design standards and practices to reduce the already low probability of an oil spill occurring as part of its operations. The wells proposed to be drilled in the Arctic are exploratory and will not be converted to production wells; thus, production casing will not be installed, and the well will be permanently plugged and abandoned once exploration drilling is complete. Shell has also developed and will implement the following plans and protocols: Shell's Critical Operations Curtailment Plan; IMP; Well Control Plan; and Fuel Transfer Plan. Many of these safety measures are required by the Department of the Interior's interim final rule implementing certain measures to improve the safety of oil and gas exploration and development on the Outer Continental Shelf in light of the Deepwater Horizon event (see 75 FR 63346, October 14, 2010). Operationally, Shell has committed to the following to help prevent an oil spill from occurring in the Beaufort Sea:

- Shell's Blow Out Preventer (BOP) was inspected and tested by an independent third party specialist;
- Further inspection and testing of the BOP have been performed to ensure the reliability of the BOP and that all functions will be performed as necessary, including shearing the drill pipe;
- Subsea BOP hydrostatic tests will be increased from once every 14 days to once every 7 days;
- A second set of blind/shear rams will be installed in the BOP stack;
- Full string casings will typically not be installed through high pressure zones;
- Liners will be installed and cemented, which allows for installation of a liner top packer;
- Testing of liners prior to installing a tieback string of casing back to the wellhead;
- Utilizing a two-barrier policy; and
- Testing of all casing hangers to ensure that they have two independent, validated barriers at all times.

NMFS has considered Shell's proposed action and has concluded that there is no reasonable likelihood of serious injury or mortality from the 2012 Camden Bay exploration drilling program. NMFS has consistently interpreted the term ''potential,'' as used in 50 CFR 216.107(a), to only include impacts that have more than a discountable probability of occurring, that is, impacts must be reasonably expected to occur. Hence, NMFS has regularly issued IHAs in cases where it found that the potential for serious injury or mortality was ''highly unlikely'' (*See* 73 FR 40512, 40514, July 15, 2008; 73 FR 45969, 45971, August 7, 2008; 73 FR 46774, 46778, August 11, 2008; 73 FR 66106, 66109, November 6, 2008; 74 FR 55368, 55371, October 27, 2009).

Interpreting ''potential'' to include impacts with any probability of occurring (*i.e.,* speculative or extremely low probability events) would nearly preclude the issuance of IHAs in every instance. For example, NMFS would be unable to issue an IHA whenever vessels were involved in the marine activity since there is always some, albeit remote, possibility that a vessel could strike and seriously injure or kill a marine mammal. This would be inconsistent with the dual-permitting scheme Congress created and undesirable from a policy perspective, as limited agency resources would be used to issue regulations that provide no additional benefit to marine mammals beyond what is proposed in this IHA.

Despite concluding that the risk of serious injury or mortality from an oil spill in this case is extremely remote, NMFS has nonetheless evaluated the potential effects of an oil spill on marine mammals. While an oil spill is not a component of Shell's specified activity, potential impacts on marine mammals from an oil spill are discussed in more detail below and will be addressed further in the Environmental Assessment.

Potential Effects of Oil on Cetaceans

The specific effects an oil spill would have on bowhead, gray, or beluga whales or harbor porpoise are not well known. While mortality is unlikely, exposure to spilled oil could lead to skin irritation, baleen fouling (which might reduce feeding efficiency), respiratory distress from inhalation of hydrocarbon vapors, consumption of some contaminated prey items, and temporary displacement from contaminated feeding areas. Geraci and St. Aubin (1990) summarize effects of oil on marine mammals, and Bratton *et al.* (1993) provides a synthesis of knowledge of oil effects on bowhead whales. The number of whales that might be contacted by a spill would depend on the size, timing, and duration of the spill and where the oil is in relation to the whales. Whales may not avoid oil spills, and some have been observed feeding within oil slicks (Goodale *et al.,* 1981). These topics are discussed in more detail next.

In the case of an oil spill occurring during migration periods, disturbance of the migrating cetaceans from cleanup activities may have more of an impact than the oil itself. Human activity associated with cleanup efforts could deflect whales away from the path of the oil. However, noise created from cleanup activities likely will be short term and localized. In fact, whale avoidance of clean-up activities may benefit whales by displacing them from the oil spill area.

There is no direct evidence that oil spills, including the much studied Santa Barbara Channel and Exxon Valdez spills, have caused any deaths of cetaceans (Geraci, 1990; Brownell, 1971; Harvey and Dahlheim, 1994). It is suspected that some individually identified killer whales that disappeared from Prince William Sound during the time of the Exxon Valdez spill were casualties of that spill. However, no clear cause and effect relationship between the spill and the disappearance could be established (Dahlheim and Matkin, 1994). The AT–1 pod of transient killer whales that sometimes inhabits Prince William Sound has continued to decline after the Exxon Valdez oil spill (EVOS). Matkin *et al.* (2008) tracked the AB resident pod and the AT–1 transient group of killer whales from 1984 to 2005. The results of their photographic surveillance indicate a much higher than usual mortality rate for both populations the year following the spill (33% for AB Pod and 41% for AT–1 Group) and lower than average rates of increase in the 16 years after the spill (annual increase of about 1.6% for AB Pod compared to an annual increase of about 3.2% for other Alaska killer whale pods). In killer whale pods, mortality rates are usually higher for non-reproductive animals and very low for reproductive animals and adolescents (Olesiuk *et al.,* 1990, 2005; Matkin *et al.,* 2005). No effects on humpback whales in Prince William Sound were evident after the EVOS (von Ziegesar *et al.,* 1994). There was some temporary displacement of humpback whales out of Prince William Sound, but this could have been caused by oil contamination, boat and aircraft disturbance, displacement of food sources, or other causes.

Migrating gray whales were apparently not greatly affected by the Santa Barbara spill of 1969. There appeared to be no relationship between the spill and mortality of marine mammals. The higher than usual counts of dead marine mammals recorded after the spill represented increased survey effort and therefore cannot be conclusively linked to the spill itself (Brownell, 1971; Geraci, 1990). The conclusion was that whales were either able to detect the oil and avoid it or were unaffected by it (Geraci, 1990).

(1) Oiling of External Surfaces

Whales rely on a layer of blubber for insulation, so oil would have little if any effect on thermoregulation by whales. Effects of oiling on cetacean skin appear to be minor and of little significance to the animal's health (Geraci, 1990). Histological data and ultrastructural studies by Geraci and St. Aubin (1990) showed that exposures of skin to crude oil for up to 45 minutes in four species of toothed whales had no effect. They switched to gasoline and applied the sponge up to 75 minutes. This produced transient damage to epidermal cells in whales. Subtle changes were evident only at the cell level. In each case, the skin damage healed within a week. They concluded that a cetacean's skin is an effective barrier to the noxious substances in petroleum. These substances normally damage skin by getting between cells and dissolving protective lipids. In cetacean skin, however, tight intercellular bridges, vital surface cells, and the extraordinary thickness of the epidermis impeded the damage. The authors could not detect a change in lipid concentration between and within cells after exposing skin from a white-sided dolphin to gasoline for 16 hours in vitro.

Bratton *et al.* (1993) synthesized studies on the potential effects of contaminants on bowhead whales. They concluded that no published data proved oil fouling of the skin of any free-living whales, and concluded that bowhead whales contacting fresh or weathered petroleum are unlikely to suffer harm. Although oil is unlikely to adhere to smooth skin, it may stick to rough areas on the surface (Henk and Mullan, 1997). Haldiman *et al.* (1985) found the epidermal layer to be as much as seven to eight times thicker than that found on most whales. They also found that little or no crude oil adhered to preserved bowhead skin that was dipped into oil up to three times, as long as a water film stayed on the skin's surface. Oil adhered in small patches to the surface and vibrissae (stiff, hairlike structures), once it made enough contact with the skin. The amount of oil sticking to the surrounding skin and epidermal depression appeared to be in proportion to the number of exposures and the roughness of the skin's surface. It can be assumed that if oil contacted the eyes, effects would be similar to those observed in ringed seals; continued exposure of the eyes to oil could cause permanent damage (St. Aubin, 1990).

(2) Ingestion

Whales could ingest oil if their food is contaminated, or oil could also be absorbed through the respiratory tract. Some of the ingested oil is voided in vomit or feces but some is absorbed and could cause toxic effects (Geraci, 1990). When returned to clean water, contaminated animals can depurate this internal oil (Engelhardt, 1978, 1982). Oil ingestion can decrease food assimilation of prey eaten (St. Aubin, 1988). Cetaceans may swallow some oil-contaminated prey, but it likely would be only a small part of their food. It is not known if whales would leave a feeding area where prey was abundant following a spill. Some zooplankton eaten by bowheads and gray whales consume oil particles and bioaccumulation can result. Tissue studies by Geraci and St. Aubin (1990) revealed low levels of naphthalene in the livers and blubber of baleen whales. This result suggests that prey have low concentrations in their tissues, or that

baleen whales may be able to metabolize and excrete certain petroleum hydrocarbons. Whales exposed to an oil spill are unlikely to ingest enough oil to cause serious internal damage (Geraci and St. Aubin, 1980, 1982) and this kind of damage has not been reported (Geraci, 1990).

(3) Fouling of Baleen

Baleen itself is not damaged by exposure to oil and is resistant to effects of oil (St. Aubin *et al.,* 1984). Crude oil could coat the baleen and reduce filtration efficiency; however, effects may be temporary (Braithwaite, 1983; St. Aubin *et al.,* 1984). If baleen is coated in oil for long periods, it could cause the animal to be unable to feed, which could lead to malnutrition or even death. Most of the oil that would coat the baleen is removed after 30 min, and less than 5% would remain after 24 hr (Bratton *et al.,* 1993). Effects of oiling of the baleen on feeding efficiency appear to be minor (Geraci, 1990). However, a study conducted by Lambertsen *et al.* (2005) concluded that their results highlight the uncertainty about how rapidly oil would depurate at the near zero temperatures in arctic waters and whether baleen function would be restored after oiling.

(4) Avoidance

Some cetaceans can detect oil and sometimes avoid it, but others enter and swim through slicks without apparent effects (Geraci, 1990; Harvey and Dahlheim, 1994). Bottlenose dolphins apparently could detect and avoid slicks and mousse but did not avoid light sheens on the surface (Smultea and Wursig, 1995). After the Regal Sword spill in 1979, various species of baleen and toothed whales were observed swimming and feeding in areas containing spilled oil southeast of Cape Cod, MA (Goodale *et al.,* 1981). For months following EVOS, there were numerous observations of gray whales, harbor porpoises, Dall's porpoises, and killer whales swimming through light-to-heavy crude-oil sheens (Harvey and Dalheim, 1994, cited in Matkin *et al.,* 2008). However, if some of the animals avoid the area because of the oil, then the effects of the oiling would be less severe on those individuals.

(5) Factors Affecting the Severity of Effects

Effects of oil on whales in open water are likely to be minimal, but there could be effects on whales where both the oil and the whales are at least partly confined in leads or at ice edges (Geraci, 1990). In spring, bowhead and beluga whales migrate through leads in the ice. At this time, the migration can be concentrated in narrow corridors defined by the leads, thereby creating a greater risk to animals caught in the spring lead system should oil enter the leads. This situation would only occur if there were an oil spill late in the season and Shell could not complete cleanup efforts prior to ice covering the area. The oil would likely then be trapped in the ice until it began to thaw in the spring.

In fall, the migration route of bowheads can be close to shore (Blackwell *et al.,* 2009c). If fall migrants were moving through leads in the pack ice or were concentrated in nearshore waters, some bowhead whales might not be able to avoid oil slicks and could be subject to prolonged contamination. However, the autumn migration past Camden Bay extends over several weeks, and some of the whales travel along routes north of the area, thereby reducing the number of whales that could approach patches of spilled oil. Additionally, vessel activity associated with spill cleanup efforts may deflect whales traveling near Camden Bay farther offshore, thereby reducing the likelihood of contact with spilled oil. Also, during years when movements of oil and whales might be partially confined by ice, the bowhead migration corridor tends to be farther offshore (Treacy, 1997; LGL and Greeneridge, 1996a; Moore, 2000).

Bowhead and beluga whales overwinter in the Bering Sea (mainly from November to March). In the summer, the majority of the bowhead whales are found in the Canadian Beaufort Sea, although some have recently been observed in the U.S. Beaufort and Chukchi Seas during the summer months (June to August). Data from the Barrow-based boat surveys in 2009 (George and Sheffield, 2009) showed that bowheads were observed almost continuously in the waters near Barrow, including feeding groups in the Chukchi Sea at the beginning of July. The majority of belugas in the Beaufort stock migrate into the Beaufort Sea in April or May, although some whales may pass Point Barrow as early as late March and as late as July (Braham *et al.,* 1984; Ljungblad *et al.,* 1984; Richardson *et al.,* 1995a). Therefore, a spill in summer would not be expected to have major impacts on these species. Additionally, while gray whales have commonly been sighted near Point Barrow, they are much less frequently found in the Camden Bay area. Therefore, an oil spill is not expected to have major impacts to gray whales.

Potential Effects of Oil on Pinnipeds

Ringed, bearded, and spotted seals are present in open-water areas during summer and early autumn. Externally oiled phocid seals often survive and become clean, but heavily oiled seal pups and adults may die, depending on the extent of oiling and characteristics of the oil. Prolonged exposure could occur if fuel or crude oil was spilled in or reached nearshore waters, was spilled in a lead used by seals, or was spilled under the ice when seals have limited mobility (NMFS, 2000). Adult seals may suffer some temporary adverse effects, such as eye and skin irritation, with possible infection (MMS, 1996). Such effects may increase stress, which could contribute to the death of some individuals. Ringed seals may ingest oil-contaminated foods, but there is little evidence that oiled seals will ingest enough oil to cause lethal internal effects. There is a likelihood that newborn seal pups, if contacted by oil, would die from oiling through loss of insulation and resulting hypothermia. These potential effects are addressed in more detail in subsequent paragraphs.

Reports of the effects of oil spills have shown that some mortality of seals may have occurred as a result of oil fouling; however, large scale mortality had not been observed prior to the EVOS (St. Aubin, 1990). Effects of oil on marine mammals were not well studied at most spills because of lack of baseline data and/or the brevity of the post-spill surveys. The largest documented impact of a spill, prior to EVOS, was on young seals in January in the Gulf of St. Lawrence (St. Aubin, 1990). Brownell and Le Boeuf (1971) found no marked effects of oil from the Santa Barbara oil spill on California sea lions or on the mortality rates of newborn pups.

Intensive and long-term studies were conducted after the EVOS in Alaska. There may have been a long-term decline of 36% in numbers of molting harbor seals at oiled haul-out sites in Prince William Sound following EVOS (Frost *et al.,* 1994a). However, in a reanalysis of those data and additional years of surveys, along with an examination of assumptions and biases associated with the original data, Hoover-Miller *et al.* (2001) concluded that the EVOS effect had been overestimated. The decline in attendance at some oiled sites was more likely a continuation of the general decline in harbor seal abundance in Prince William Sound documented since 1984 (Frost *et al.,* 1999) rather than a result of EVOS. The results from Hoover-Miller *et al.* (2001) indicate that the effects of EVOS were largely

indistinguishable from natural decline by 1992. However, while Frost *et al.* (2004) concluded that there was no evidence that seals were displaced from oiled sites, they did find that aerial counts indicated 26% fewer pups were produced at oiled locations in 1989 than would have been expected without the oil spill. Harbor seal pup mortality at oiled beaches was 23% to 26%, which may have been higher than natural mortality, although no baseline data for pup mortality existed prior to EVOS (Frost *et al.,* 1994a). There was no conclusive evidence of spill effects on Steller sea lions (Calkins *et al.,* 1994). Oil did not persist on sea lions themselves (as it did on harbor seals), nor did it persist on sea lion haul-out sites and rookeries (Calkins *et al.,* 1994). Sea lion rookeries and haul out sites, unlike those used by harbor seals, have steep sides and are subject to high wave energy (Calkins *et al.,* 1994).

(1) Oiling of External Surfaces

Adult seals rely on a layer of blubber for insulation, and oiling of the external surface does not appear to have adverse thermoregulatory effects (Kooyman *et al.,* 1976, 1977; St. Aubin, 1990). Contact with oil on the external surfaces can potentially cause increased stress and irritation of the eyes of ringed seals (Geraci and Smith, 1976; St. Aubin, 1990). These effects seemed to be temporary and reversible, but continued exposure of eyes to oil could cause permanent damage (St. Aubin, 1990). Corneal ulcers and abrasions, conjunctivitis, and swollen nictitating membranes were observed in captive ringed seals placed in crude oil-covered water (Geraci and Smith, 1976) and in seals in the Antarctic after an oil spill (Lillie, 1954).

Newborn seal pups rely on their fur for insulation. Newborn ringed seal pups in lairs on the ice could be contaminated through contact with oiled mothers. There is the potential that newborn ringed seal pups that were contaminated with oil could die from hypothermia.

(2) Ingestion

Marine mammals can ingest oil if their food is contaminated. Oil can also be absorbed through the respiratory tract (Geraci and Smith, 1976; Engelhardt *et al.,* 1977). Some of the ingested oil is voided in vomit or feces but some is absorbed and could cause toxic effects (Engelhardt, 1981). When returned to clean water, contaminated animals can depurate this internal oil (Engelhardt, 1978, 1982, 1985). In addition, seals exposed to an oil spill are unlikely to ingest enough oil to cause serious internal damage (Geraci and St. Aubin, 1980, 1982).

(3) Avoidance and Behavioral Effects

Although seals may have the capability to detect and avoid oil, they apparently do so only to a limited extent (St. Aubin, 1990). Seals may abandon the area of an oil spill because of human disturbance associated with cleanup efforts, but they are most likely to remain in the area of the spill. One notable behavioral reaction to oiling is that oiled seals are reluctant to enter the water, even when intense cleanup activities are conducted nearby (St. Aubin, 1990; Frost *et al.,* 1994b, 2004).

(4) Factors Affecting the Severity of Effects

Seals that are under natural stress, such as lack of food or a heavy infestation by parasites, could potentially die because of the additional stress of oiling (Geraci and Smith, 1976; St. Aubin, 1990; Spraker *et al.,* 1994). Female seals that are nursing young would be under natural stress, as would molting seals. In both cases, the seals would have reduced food stores and may be less resistant to effects of oil than seals that are not under some type of natural stress. Seals that are not under natural stress (*e.g.,* fasting, molting) would be more likely to survive oiling.

In general, seals do not exhibit large behavioral or physiological reactions to limited surface oiling or incidental exposure to contaminated food or vapors (St. Aubin, 1990; Williams *et al.,* 1994). Effects could be severe if seals surface in heavy oil slicks in leads or if oil accumulates near haul-out sites (St. Aubin, 1990). An oil spill in open water is less likely to impact seals.

The potential effects to marine mammals described in this section of the document do not take into consideration the proposed monitoring and mitigation measures described later in this document (see the ''Proposed Mitigation'' and ''Proposed Monitoring and Reporting'' sections).

Anticipated Effects on Marine Mammal Habitat

The primary potential impacts to marine mammals and other marine species are associated with elevated sound levels produced by the exploratory drilling program (*i.e.* the drillship and the airguns). However, other potential impacts are also possible to the surrounding habitat from physical disturbance and an oil spill (should one occur). This section describes the potential impacts to marine mammal habitat from the specified activity. Because the marine mammals in the area feed on fish and/or invertebrates there is also information on the species typically preyed upon by the marine mammals in the area.

Common Marine Mammal Prey in the Project Area

All eight of the marine mammal species that may occur in the proposed project area prey on either marine fish or invertebrates. The ringed seal feeds on fish and a variety of benthic species, including crabs and shrimp. Bearded seals feed mainly on benthic organisms, primarily crabs, shrimp, and clams. Spotted seals feed on pelagic and demersal fish, as well as shrimp and cephalopods. They are known to feed on a variety of fish including herring, capelin, sand lance, Arctic cod, saffron cod, and sculpins. Ribbon seals feed primarily on pelagic fish and invertebrates, such as shrimp, crabs, squid, octopus, cod, sculpin, pollack, and capelin. Juveniles feed mostly on krill and shrimp.

Bowhead whales feed in the eastern Beaufort Sea during summer and early autumn but continue feeding to varying degrees while on their migration through the central and western Beaufort Sea in the late summer and fall (Richardson and Thomson [eds.], 2002). Aerial surveys in recent years have sighted bowhead whales feeding in Camden Bay on their westward migration through the Beaufort Sea. When feeding in relatively shallow areas, bowheads feed throughout the water column. However, feeding is concentrated at depths where zooplankton is concentrated (Wursig *et al.,* 1984, 1989; Richardson [ed.], 1987; Griffiths *et al.,* 2002). Lowry and Sheffield (2002) found that copepods and euphausiids were the most common prey found in stomach samples from bowhead whales harvested in the Kaktovik area from 1979 to 2000. Areas to the east of Barter Island (which is approximately 60 mi [96.6 km] east of Shell's proposed drill sites in Camden Bay) appear to be used regularly for feeding as bowhead whales migrate slowly westward across the Beaufort Sea (Thomson and Richardson, 1987; Richardson and Thomson [eds.], 2002). However, in some years, sizable groups of bowhead whales have been seen feeding as far west as the waters just east of Point Barrow (which is more than 250 mi [402 km] west of Shell's proposed drill sites in Camden Bay) near the Plover Islands (Braham *et al.,* 1984; Ljungblad *et al.,* 1985; Landino *et al.,* 1994). The situation in September–October 1997 was unusual in that bowheads fed widely across the Alaskan

Beaufort Sea, including higher numbers in the area east of Barrow than reported in any previous year (S. Treacy and D. Hansen, MMS, pers. comm.).

Beluga whales feed on a variety of fish, shrimp, squid and octopus (Burns and Seaman, 1985). Very few beluga whales occur near Northstar; their main migration route is much further offshore. Like several of the other species in the area, harbor porpoise feed on demersal and benthic species, mainly schooling fish and cephalopods. Harbor porpoise are also not commonly found in Camden Bay.

Gray whales are primarily bottom feeders, and benthic amphipods and isopods form the majority of their summer diet, at least in the main summering areas west of Alaska (Oliver *et al.,* 1983; Oliver and Slattery, 1985). Farther south, gray whales have also been observed feeding around kelp beds, presumably on mysid crustaceans, and on pelagic prey such as small schooling fish and crab larvae (Hatler and Darling, 1974).

Two kinds of fish inhabit marine waters in the study area: (1) True marine fish that spend all of their lives in salt water, and (2) anadromous species that reproduce in fresh water and spend parts of their life cycles in salt water.

Most arctic marine fish species are small, benthic forms that do not feed high in the water column. The majority of these species are circumpolar and are found in habitats ranging from deep offshore water to water as shallow as 16.4–33 ft (5–10 m; Fechhelm *et al.,* 1995). The most important pelagic species, and the only abundant pelagic species, is the Arctic cod. The Arctic cod is a major vector for the transfer of energy from lower to higher trophic levels (Bradstreet *et al.,* 1986). In summer, Arctic cod can form very large schools in both nearshore and offshore waters (Craig *et al.,* 1982; Bradstreet *et al.,* 1986). Locations and areas frequented by large schools of Arctic cod cannot be predicted but can be almost anywhere. The Arctic cod is a major food source for beluga whales, ringed seals, and numerous species of seabirds (Frost and Lowry, 1984; Bradstreet *et al.,* 1986).

Anadromous Dolly Varden char and some species of whitefish winter in rivers and lakes, migrate to the sea in spring and summer, and return to fresh water in autumn. Anadromous fish form the basis of subsistence, commercial, and small regional sport fisheries. Dolly Varden char migrate to the sea from May through mid-June (Johnson, 1980) and spend about 1.5–2.5 months there (Craig, 1989). They return to rivers beginning in late July or early August with the peak return migration occurring between mid-August and early September (Johnson, 1980). At sea, most anadromous corregonids (whitefish) remain in nearshore waters within several kilometers of shore (Craig, 1984, 1989). They are often termed ''amphidromous'' fish in that they make repeated annual migrations into marine waters to feed, returning each fall to overwinter in fresh water.

Benthic organisms are defined as bottom dwelling creatures. Infaunal organisms are benthic organisms that live within the substrate and are often sedentary or sessile (bivalves, polychaetes). Epibenthic organisms live on or near the bottom surface sediments and are mobile (amphipods, isopods, mysids, and some polychaetes). Epifauna, which live attached to hard substrates, are rare in the Beaufort Sea because hard substrates are scarce there. A small community of epifauna, the Boulder Patch, occurs in Stefansson Sound.

Many of the nearshore benthic marine invertebrates of the Arctic are circumpolar and are found over a wide range of water depths (Carey *et al.,* 1975). Species identified include polychaetes (*Spio filicornis, Chaetozone setosa, Eteone longa*), bivalves (*Cryrtodaria kurriana, Nucula tenuis, Liocyma fluctuosa*), an isopod (*Saduria entomon*), and amphipods (*Pontoporeia femorata, P. affinis*).

Nearshore benthic fauna have been studied in lagoons west of Camden Bay and near the mouth of the Colville River (Kinney *et al.,* 1971, 1972; Crane and Cooney, 1975). The waters of Simpson Lagoon, Harrison Bay, and the nearshore region support a number of infaunal species including crustaceans, mollusks, and polychaetes. In areas influenced by river discharge, seasonal changes in salinity can greatly influence the distribution and abundance of benthic organisms. Large fluctuations in salinity and temperature that occur over a very short time period, or on a seasonal basis, allow only very adaptable, opportunistic species to survive (Alexander *et al.,* 1974). Since shorefast ice is present for many months, the distribution and abundance of most species depends on annual (or more frequent) recolonization from deeper offshore waters (Woodward Clyde Consultants, 1995). Due to ice scouring, particularly in water depths of less than 8 ft (2.4 m), infaunal communities tend to be patchily distributed. Diversity increases with water depth until the shear zone is reached at 49–82 ft (15–25 m; Carey, 1978). Biodiversity then declines due to ice gouging between the landfast ice and the polar pack ice (Woodward Clyde Consultants, 1995).

Potential Impacts From Seafloor Disturbance on Marine Mammal Habitat

There is a possibility of some seafloor disturbance or temporary increased turbidity in the seabed sediments during anchoring and excavation of the mudline cellars (MLCs). The amount and duration of disturbed or turbid conditions will depend on sediment material and consolidation of specific activity.

The *Kulluk* would be anchored using a 12-point anchor system held in place with 12, 15 metric ton Stevpris anchors, and the *Discoverer* would be stabilized and held in place with a system of eight 7,000 kg Stevpris anchors during operations. The anchors from either drilling vessel are designed to embed into the seafloor. Prior to setting, the anchors will penetrate the seafloor and drag two or three times their length. Both the anchor and anchor chain will disturb sediments and create an ''anchor scar'' which is a depression in the seafloor caused by the anchor embedding. The anchor scar is a depression with ridges of displaced sediment, and the area of disturbance will often be greater than the size of the anchor itself because the anchor is dragged along the seafloor until it takes hold and sets.

For the *Kulluk,* each Stevpris anchor may impact an area of 2,928 ft^2 (272 m^2), whereas each Stevpris anchor from the *Discoverer* may impact an area of 2,027 ft^2 (188 m^2) of the seafloor. Minimum impact estimates of the seafloor from each well or mooring with the 12 anchors of the *Kulluk* is 35,136 ft^2 (3,264 m^2) or with the eight anchors of the *Discoverer* is 16,216 ft^2 (1,507 m^2). This estimate assumes that the anchors are set only once. Shell plans to pre-set anchors at each drill site for whichever drillship is used for drilling. Unless moved by an outside force such as sea current, anchors should only need to be set once per drill site. (Shell proposes to drill at two sites in Camden Bay during the 2012 open-water season.) Additionally, based on the vast size of the Beaufort Sea, the area of disturbance is not anticipated to adversely affect marine mammal use of the area.

Once the drillship ends operation, the anchors will be retrieved. Over time, the anchor scars will be filled through natural movement of sediment. The duration of the scars depends upon the energy of the system, water depth, ice scour, and sediment type. Anchor scars were visible under low energy conditions in the North Sea for 5–10 years after retrieval. Scars typically do

not form or persist in sandy mud or sand sediments but may last for 9 years in hard clays (Centaur Associates Inc., 1984). The surficial Holocene soils at the Sivulliq and Torpedo prospects consist primarily of soft to stiff silts and clays with low to medium plasticity. The fine sand present in contact with underlying silts and clays is variable, as the sand tends to infill old gouges. Local depositional processes will strongly affect the range of properties for Holocene soils. The energy regime plus possible effects of ice gouge in the Beaufort Sea suggest that anchor scars would be refilled faster than in the North Sea.

Excavation of each MLC by the *Kulluk* will displace about 24,579 ft^3 (696 m^3) of seafloor sediments and directly disturb approximately 452 ft^2 (42m^2) of seafloor. Excavation of each MLC by the *Discoverer* will displace about 17,128 ft^3 (485 m^3) of seafloor sediments and directly disturb approximately 314 ft^2 (29 m^2) of seafloor. The MLC excavation amounts range in volume because the MLC bits for the *Kulluk* and *Discoverer* differ in size and hence excavate different diameter MLCs. Material will be excavated from the MLCs using a large diameter drillbit. Pressurized air and water (no drilling mud used) will be used to assist in the removal of the excavated materials from the MLC. Some of the excavated sediments will be displaced to adjacent seafloor areas and some will be removed via the air lift system and discharged on the seafloor away from the MLC. These excavated materials will also have some indirect effects as they are deposited on the seafloor in the vicinity of the MLCs. Direct and indirect effects would include slight changes in seafloor relief and sediment consistency.

Vessel mooring and MLC construction would result in increased suspended sediment in the water column that could result in lethal effects on some zooplankton (food source for baleen whales). However, compared to the overall population of zooplankton and the localized nature of effects, any mortality that may occur would not be considered significant. Due to fast regeneration periods of zooplankton, populations are expected to recover quickly.

Impacts on fish resulting from suspended sediments would be dependent upon the life stage of the fish (*e.g.,* eggs, larvae, juveniles, or adults), the concentration of the suspended sediments, the type of sediment, and the duration of exposure (IMG Golder, 2004). Eggs and larvae have been found to exhibit greater sensitivity to suspended sediments (Wilber and Clarke, 2001) and other stresses, which is thought to be related to their relative lack of motility (Auld and Schubel, 1978). Sedimentation could affect fish by causing egg morbidity of demersal fish feeding near or on the ocean floor (Wilber and Clarke, 2001). Surficial membranes are especially susceptible to abrasion (Cairns and Scheier, 1968). However, most of the abundant Beaufort Sea fish species with demersal eggs spawn under the ice in the winter well before MLC excavation would occur. Exposure of pelagic eggs would be much shorter as they move with ocean currents (Wilber and Clarke, 2001).

Suspended sediments, resulting from vessel mooring and MLC excavation, are not expected to result in permanent damage to habitats used by the marine mammal species in the proposed project area or on the food sources that they utilize. Rather, NMFS considers that such impacts will be temporary in nature and concentrated in the areas directly surrounding vessel mooring and MLC excavation activities—areas which are very small relative to the overall Beaufort Sea region.

Potential Impacts From Sound Generation

With regard to fish as a prey source for odontocetes and seals, fish are known to hear and react to sounds and to use sound to communicate (Tavolga *et al.,* 1981) and possibly avoid predators (Wilson and Dill, 2002). Experiments have shown that fish can sense both the strength and direction of sound (Hawkins, 1981). Primary factors determining whether a fish can sense a sound signal, and potentially react to it, are the frequency of the signal and the strength of the signal in relation to the natural background noise level.

Fishes produce sounds that are associated with behaviors that include territoriality, mate search, courtship, and aggression. It has also been speculated that sound production may provide the means for long distance communication and communication under poor underwater visibility conditions (Zelick *et al.,* 1999), although the fact that fish communicate at low-frequency sound levels where the masking effects of ambient noise are naturally highest suggests that very long distance communication would rarely be possible. Fishes have evolved a diversity of sound generating organs and acoustic signals of various temporal and spectral contents. Fish sounds vary in structure, depending on the mechanism used to produce them (Hawkins, 1993). Generally, fish sounds are predominantly composed of low frequencies (less than 3 kHz).

Since objects in the water scatter sound, fish are able to detect these objects through monitoring the ambient noise. Therefore, fish are probably able to detect prey, predators,conspecifics, and physical features by listening to environmental sounds (Hawkins, 1981). There are two sensory systems that enable fish to monitor the vibration-based information of their surroundings. The two sensory systems, the inner ear and the lateral line, constitute the acoustico-lateralis system.

Although the hearing sensitivities of very few fish species have been studied to date, it is becoming obvious that the intra- and inter-specific variability is considerable (Coombs, 1981). Nedwell *et al.* (2004) compiled and published available fish audiogram information. A noninvasive electrophysiological recording method known as auditory brainstem response is now commonly used in the production of fish audiograms (Yan, 2004). Generally, most fish have their best hearing in the low-frequency range (*i.e.,* less than 1 kHz). Even though some fish are able to detect sounds in the ultrasonic frequency range, the thresholds at these higher frequencies tend to be considerably higher than those at the lower end of the auditory frequency range.

Literature relating to the impacts of sound on marine fish species can be divided into the following categories: (1) Pathological effects; (2) physiological effects; and (3) behavioral effects. Pathological effects include lethal and sub-lethal physical damage to fish; physiological effects include primary and secondary stress responses; and behavioral effects include changes in exhibited behaviors of fish. Behavioral changes might be a direct reaction to a detected sound or a result of the anthropogenic sound masking natural sounds that the fish normally detect and to which they respond. The three types of effects are often interrelated in complex ways. For example, some physiological and behavioral effects could potentially lead to the ultimate pathological effect of mortality. Hastings and Popper (2005) reviewed what is known about the effects of sound on fishes and identified studies needed to address areas of uncertainty relative to measurement of sound and the responses of fishes. Popper *et al.* (2003/2004) also published a paper that reviews the effects of anthropogenic sound on the behavior and physiology of fishes.

Potential effects of exposure to continuous sound on marine fish include TTS, physical damage to the ear region, physiological stress responses, and behavioral responses such as startle

response, alarm response, avoidance, and perhaps lack of response due to masking of acoustic cues. Most of these effects appear to be either temporary or intermittent and therefore probably do not significantly impact the fish at a population level. The studies that resulted in physical damage to the fish ears used noise exposure levels and durations that were far more extreme than would be encountered under conditions similar to those expected during Shell's proposed exploratory drilling activities.

The level of sound at which a fish will react or alter its behavior is usually well above the detection level. Fish have been found to react to sounds when the sound level increased to about 20 dB above the detection level of 120 dB (Ona, 1988); however, the response threshold can depend on the time of year and the fish's physiological condition (Engas *et al.,* 1993). In general, fish react more strongly to pulses of sound rather than a continuous signal (Blaxter *et al.,* 1981), such as the type of sound that will be produced by the drillship, and a quicker alarm response is elicited when the sound signal intensity rises rapidly compared to sound rising more slowly to the same level.

Investigations of fish behavior in relation to vessel noise (Olsen *et al.,* 1983; Ona, 1988; Ona and Godo, 1990) have shown that fish react when the sound from the engines and propeller exceeds a certain level. Avoidance reactions have been observed in fish such as cod and herring when vessels approached close enough that received sound levels are 110 dB to 130 dB (Nakken, 1992; Olsen, 1979; Ona and Godo, 1990; Ona and Toresen, 1988). However, other researchers have found that fish such as polar cod, herring, and capeline are often attracted to vessels (apparently by the noise) and swim toward the vessel (Rostad *et al.,* 2006). Typical sound source levels of vessel noise in the audible range for fish are 150 dB to 170 dB (Richardson *et al.,* 1995a). (Based on models, the 160 dB radius for the *Discoverer* would extend approximately 33 ft [10 m] and the 160 dB radius for the *Kulluk* would extend approximately 180 ft [55 m]; therefore, fish would need to be in close proximity to the drillship for the noise to be audible). In calm weather, ambient noise levels in audible parts of the spectrum lie between 60 dB to 100 dB.

Sound will also occur in the marine environment from the various support vessels. Reported source levels for vessels during ice management have ranged from 175 dB to 185 dB (Brewer *et al.,* 1993, Hall *et al.,* 1994). However, ice management or icebreaking activities are not expected to be necessary throughout the entire drilling season, so impacts from that activity would occur less frequently than sound from the drillship. Sound pressures generated by drilling vessels during active drilling operations have been measured during past exploration in the Beaufort and Chukchi seas. Sounds generated by drilling and ice management/ icebreaking are generally low frequency and within the frequency range detectable by most fish.

Shell also proposes to conduct seismic surveys with an airgun array for a short period of time during the drilling season (a total of approximately 20–28 hours over the course of the entire proposed drilling program). Airguns produce impulsive sounds as opposed to continuous sounds at the source. Short, sharp sounds can cause overt or subtle changes in fish behavior. Chapman and Hawkins (1969) tested the reactions of whiting (hake) in the field to an airgun. When the airgun was fired, the fish dove from 82 to 180 ft (25 to 55 m) depth and formed a compact layer. The whiting dove when received sound levels were higher than 178 dB re 1 μPa (Pearson *et al.,* 1992).

Pearson *et al.* (1992) conducted a controlled experiment to determine effects of strong noise pulses on several species of rockfish off the California coast. They used an airgun with a source level of 223 dB re 1 μPa. They noted:

- Startle responses at received levels of 200–205 dB re 1 μPa and above for two sensitive species, but not for two other species exposed to levels up to 207 dB;
- Alarm responses at 177–180 dB for the two sensitive species, and at 186 to 199 dB for other species;
- An overall threshold for the above behavioral response at about 180 dB;
- An extrapolated threshold of about 161 dB for subtle changes in the behavior of rockfish; and
- A return to pre-exposure behaviors within the 20–60 minute exposure period.

In summary, fish often react to sounds, especially strong and/or intermittent sounds of low frequency. Sound pulses at received levels of 160 dB re 1 μPa may cause subtle changes in behavior. Pulses at levels of 180 dB may cause noticeable changes in behavior (Chapman and Hawkins, 1969; Pearson *et al.,* 1992; Skalski *et al.,* 1992). It also appears that fish often habituate to repeated strong sounds rather rapidly, on time scales of minutes to an hour. However, the habituation does not endure, and resumption of the strong sound source may again elicit disturbance responses from the same fish. Underwater sound levels from the drillship and other vessels produce sounds lower than the response threshold reported by Pearson *et al.* (1992), and are not likely to result in major effects to fish near the proposed drill sites.

Based on a sound level of approximately 140 dB, there may be some avoidance by fish of the area near the drillship while drilling, around ice management vessels in transit and during ice management, and around other support and supply vessels when underway. Any reactions by fish to these sounds will last only minutes (Mitson and Knudsen, 2003; Ona *et al.,* 2007) longer than the vessel is operating at that location or the drillship is drilling. Any potential reactions by fish would be limited to a relatively small area within about 0.21 mi (0.34 km) of the drillship during drilling (JASCO, 2007). Avoidance by some fish or fish species could occur within portions of this area. No important spawning habitats are known to occur at or near the drilling locations.

Some of the fish species found in the Arctic are prey sources for odontocetes and pinnipeds. A reaction by fish to sounds produced by Shell's proposed operations would only be relevant to marine mammals if it caused concentrations of fish to vacate the area. Pressure changes of sufficient magnitude to cause that type of reaction would probably occur only very close to the sound source, if any would occur at all due to the low energy sounds produced by the majority of equipment proposed for use. Impacts on fish behavior are predicted to be inconsequential. Thus, feeding odontocetes and pinnipeds would not be adversely affected by this minimal loss or scattering, if any, of reduced prey abundance.

Some mysticetes, including bowhead whales, feed on concentrations of zooplankton. Some feeding bowhead whales may occur in the Alaskan Beaufort Sea in July and August, and others feed intermittently during their westward migration in September and October (Richardson and Thomson [eds.], 2002; Lowry *et al.,* 2004). Reactions of zooplankton to sound are, for the most part, not known. Their ability to move significant distances is limited or nil, depending on the type of zooplankton. Behavior of zooplankters is not expected to be affected by the exploratory drilling activities. These animals have exoskeletons and no air bladders. Many crustaceans can make sounds, and some crustacea and other

invertebrates have some type of sound receptor. A reaction by zooplankton to sounds produced by the exploratory drilling program would only be relevant to whales if it caused concentrations of zooplankton to scatter. Pressure changes of sufficient magnitude to cause that type of reaction would probably occur only very close to the sound source, if any would occur at all due to the low energy sounds produced by the drillship. Impacts on zooplankton behavior are predicted to be inconsequential. Thus, feeding mysticetes would not be adversely affected by this minimal loss or scattering, if any, of reduced zooplankton abundance.

Aerial surveys in recent years have sighted bowhead whales feeding in Camden Bay on their westward migration through the Beaufort Sea. Individuals feeding in the Camden Bay area at the beginning of the migration (*i.e.,* approximately late August or early September) are not expected to be impacted by Shell's proposed drilling program, primarily because of Shell's proposal to suspend operations and depart the area on August 25 and not return until the close of the Kaktovik and Nuiqsut (Cross Island) hunts, which typically ends around mid- to late September (see the ''*Plan of Cooperation (POC)''* subsection later in this document for more details). If other individual bowheads stop to feed in the Camden Bay area after Shell resumes drilling operations in mid- to late September, they may potentially be exposed to sounds from the drillship or the airguns. However, injury to the bowhead whales is not anticipated, as the source level of the drillship is not loud enough to cause even mild TTS, as discussed earlier in this document, and mitigation measures are proposed to reduce even further the low risk of hearing impairment from the airguns. As mentioned earlier in this document, some bowhead whales have demonstrated avoidance behavior in areas of industrial sound (*e.g.,* Richardson *et al.,* 1999) and some have continued to feed even in the presence of industrial activities (Richardson, 2004). However, Camden Bay is not the only feeding location for bowhead whales in the Beaufort Sea. Also, as discussed previously, drilling operations are not expected to adversely affect bowhead whale prey species or preclude bowhead whales from obtaining sufficient food resources along their traditional migratory path.

Potential Impacts From Drill Cuttings

Discharging drill cuttings or other liquid waste streams generated by the drilling vessel could potentially affect marine mammal habitat. Toxins could persist in the water column, which could have an impact on marine mammal prey species. However, despite a considerable amount of investment in research of exposures of marine mammals to organochlorines or other toxins, there have been no marine mammal deaths in the wild that can be conclusively linked to the direct exposure to such substances (O'Shea, 1999).

For the Camden Bay proposed exploration drilling program, Shell has committed to not discharge various waste streams during routine drilling operations. Shell has agreed to not discharge any of the following liquid waste streams that are generated by the drilling vessel: treated sanitary waste (black water); domestic waste (gray water); bilge water; or ballast water. Shell will not discharge drilling mud or cuttings that are generated below the depth at which the 20-in. (51-cm) diameter casing is set in each well. The mud and cuttings collected will be transferred to an OSV then to the deck or waste barge. Either barge will hold collected mud, cuttings, and wastewater for transport and disposal at an approved and licensed onshore facility.

Shell proposes that cuttings generated while drilling the MLC, the 36- and 26-in. (91- and 66-cm) hole sections (all drilled with seawater and viscous sweeps only) plus cement discharged while cementing the 30- and 20-in. (76- and 51-cm) casing strings will be discharged on the surface of the seafloor under provisions of an approved National Pollutant Discharge Elimination System (NPDES) General Permit (GP) administered by the U.S. Environmental Protection Agency (EPA). The most recent NPDES GP expired on June 26, 2011. The EPA is currently processing two separate requests for NPDES exploration GPs in the Beaufort and Chukchi seas.

The NPDES GP establishes discharge limits for drilling fluids (at the end of a discharge pipe) to a minimum 96-hr LC_{50} of 30,000 parts per million. Both modeling and field studies have shown that discharged drilling fluids are diluted rapidly in receiving waters (Ayers *et al.,* 1980a,b; Brandsma *et al.,* 1980; NRC, 1983; O'Reilly *et al.,* 1989; Nedwed *et al.,* 2004; Smith *et al.,* 2004; Neff, 2005). The dilution rate is strongly affected by the discharge rate; the NPDES GP limits the discharge of cuttings and fluids to 750 bbl/hr. For example, the EPA modeled hypothetical 750 bbl/hr discharges of drilling fluids in water depths of 66 ft (20 m) in the Beaufort and Chukchi Seas and predicted a minimum dilution of 1,326:1 at 330 ft (100 m).

Modeling of similar discharges offshore of Sakhalin Island predicted a 1,000-fold dilution within 10 minutes and 330 ft (100 m) of the discharge. In a field study (O'Reilly *et al.,* 1989) of a drilling waste discharge offshore of California, a 270 bbl discharge of drilling fluids was found to be diluted 183-fold at 33 ft (10 m) and 1,049-fold at 330 ft (100 m). Neff (2005) concluded that concentrations of discharged drilling fluids drop to levels that would have no effect within about two minutes of discharge and within 16 ft (5 m) of the discharge location.

Based on the fact that Shell plans to store the drilling muds and other liquid waste streams and transport them to a site onshore, no impacts to marine mammal habitat or marine mammal prey species are anticipated from such an activity.

Potential Impacts From Drillship Presence

The *Kulluk* is 266 ft (81 m) in diameter, and the *Discoverer* is 514 ft (156.7 m) long. If an animal's swim path is directly perpendicular to the drillship, the animal will need to swim around the ship in order to pass through the area. The diameter of the *Kulluk* or the length of the *Discoverer* (approximately one and a half football fields) is not significant enough to cause a large-scale diversion from the animals' normal swim and migratory paths. Additionally, the eastward spring bowhead whale migration will not be affected by the proposed exploratory drilling program because the migration will occur prior to Shell's arrival in the Beaufort Sea. The westward fall bowhead whale migration begins in late August/early September and lasts through October. As discussed throughout this document, Shell plans to suspend all operations on August 25, move the drillship and all support vessels out of the area to a location north and west of the well sites, and will not resume drilling activities until the close of the Kaktovik and Nuiqsut (Cross Island) bowhead subsistence hunts. This will reduce the amount of time that the *Kulluk* or *Discoverer* may impede the bowheads' normal swim and migratory paths as they move through Camden Bay. Moreover, any deflection of bowhead whales or other marine mammal species due to the physical presence of the drillship or its support vessels would be very minor. The drillship's physical footprint is small relative to the size of the geographic region it will occupy and will likely not cause marine mammals to deflect

greatly from their typical migratory route. Also, even if animals may deflect because of the presence of the drillship, the Beaufort Sea's migratory corridor is much larger in size than the length of the drillship (many dozens of miles vs. less than two football fields), and animals would have other means of passage around the drillship. While there are other vessels that will be on location to support the drillship, most of those vessels will remain within a few kilometers of the drillship (with the exception of the ice management vessels which will remain approximately 25 mi [40 km] upwind of the drillship when not in use). In sum, the physical presence of the drillship is not likely to cause a significant deflection to migrating marine mammals.

Potential Impacts From an Oil Spill

Arctic cod and other fishes are a principal food item for beluga whales and seals in the Beaufort Sea. Anadromous fish are more sensitive to oil when in the marine environment than when in the fresh water environment (Moles *et al.,* 1979). Generally, arctic fish are more sensitive to oil than are temperate species (Rice *et al.,* 1983). However, fish in the open sea are unlikely to be affected by an oil spill. Fish in shallow nearshore waters could sustain heavy mortality if an oil slick were to remain in the area for several days or longer. Fish concentrations in shallow nearshore areas that are used as feeding habitat for seals and whales could be unavailable as prey. Because the animals are mobile, effects would be minor during the ice-free period when whales and seals could go to unaffected areas to feed.

Effects of oil on zooplankton as food for bowhead whales were discussed by Richardson ([ed.] 1987). Zooplankton populations in the open sea are unlikely to be depleted by the effects of an oil spill. Oil concentrations in water under a slick are low and unlikely to have anything but very minor effects on zooplankton. Zooplankton populations in near surface waters could be depleted; however, concentrations of zooplankton in near-surface waters generally are low compared to those in deeper water (Bradstreet *et al.,* 1987; Griffiths *et al.,* 2002).

Some bowheads feed in shallow nearshore waters (Bradstreet *et al.,* 1987; Richardson and Thomson [eds.], 2002). Wave action in nearshore waters could cause high concentrations of oil to be found throughout the water column. Oil slicks in nearshore feeding areas could contaminate food and render the site unusable as a feeding area. Additionally, gray whales do not commonly feed in the Beaufort Sea and are rarely seen near the proposed drill sites in Camden Bay.

Effects of oil spills on zooplankton as food for seals would be similar to those described above for bowhead whales. During the ice-free period, effects on seal feeding would be minor.

Bearded seals consume benthic animals. Wave action in nearshore waters could cause oil to reach the bottom through adherence to suspended sediments (Sanders *et al.,* 1990). There could be mortality of benthic animals and elimination of some benthic feeding habitat. During the ice-free period, effects on seal feeding would be minor. During the ice-free period, seals and whales could find alternate feeding habitats.

Depending on the timing of a spill, planktonic larval forms of organisms in arctic kelp communities such as annelids, mollusks, and crustaceans may be affected by floating oil. The contact may occur anywhere near the surface of the water column (MMS, 1996). Due to their wide distribution, large numbers, and rapid rate of regeneration, the recovery of marine invertebrate populations is expected to occur soon after the surface oil passes. Spill response activities are not likely to disturb the prey items of whales or seals sufficiently to cause more than minor effects. Spill response activities could cause marine mammals to avoid the disturbed habitat that is being cleaned. However, by causing avoidance, animals would avoid impacts from the oil itself. Additionally, the likelihood of an oil spill is expected to be very low, as discussed earlier in this document.

Potential Impacts From Ice Management/Icebreaking Activities

Ice management activities include the physical pushing or moving of ice to create more open-water in the proposed drilling area and to prevent ice floes from striking the drillship. Icebreaking activities include the physical breaking of ice. Shell does not intend to conduct icebreaking activities. However, should there be a need for icebreaking, it would only be performed in order to safely move the drillship and other vessels off location and to end operations for the season. Ringed, bearded, spotted, and ribbon seals (along with the walrus) are dependent on sea ice for at least part of their life history. Sea ice is important for life functions such as resting, breeding, and molting. These species are dependent on two different types of ice: pack ice and landfast ice. Should ice management/icebreaking activities be necessary during the proposed drilling program, Shell would only manage pack ice in either early to mid-July or mid- to late October. Landfast ice would not be present during Shell's proposed operations.

The ringed seal is the most common pinniped species in the proposed project area. While ringed seals use ice year-round, they do not construct lairs for pupping until late winter/early spring on the landfast ice. Therefore, since Shell plans to conclude drilling on October 31, Shell's activities would not impact ringed seal lairs or habitat needed for breeding and pupping in the Camden Bay area. Ringed seals can be found on the pack ice surface in the late spring and early summer in the Beaufort Sea, the latter part of which may overlap with the start of Shell's proposed drilling activities. If an ice floe is pushed into one that contains hauled out seals, the animals may become startled and enter the water when the two ice floes collide. Bearded seals breed in the Bering and Chukchi Seas, as the Beaufort Sea provides less suitable habitat for the species. Spotted seals are even less common in the Camden Bay area. This species does not breed in the Beaufort Sea. Additionally, ribbon seals are not known to breed in the Beaufort Sea. Therefore, ice used by bearded, spotted, and ribbon seals needed for life functions such as breeding and molting would not be impacted as a result of Shell's drilling program since these life functions do not occur in the proposed project area. For ringed seals, ice management/icebreaking would occur during a time when life functions such as breeding, pupping, and molting do not occur in the proposed activity area. Additionally, these life functions normally occur on landfast ice, which will not be impacted by Shell's activity.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under Sections 101(a)(5)(A) and (D) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant). This section summarizes the contents of Shell's Marine Mammal Monitoring and Mitigation Plan (4MP). Later in this document in the ''Proposed Incidental Harassment Authorization'' section, NMFS lays out the proposed conditions

for review, as they would appear in the final IHA (if issued).

Mitigation Measures Proposed by Shell

Shell submitted a 4MP as part of its application (Attachment C; see **ADDRESSES**). Shell's planned offshore drilling program incorporates both design features and operational procedures for minimizing potential impacts on marine mammals and on subsistence hunts. The design features and operational procedures have been described in the IHA and LOA applications submitted to NMFS and USFWS, respectively, and are summarized here. Survey design features include:

- Timing and locating drilling and support activities to avoid interference with the annual fall bowhead whale hunts from Kaktovik, Nuiqsut (Cross Island), and Barrow;
- Identifying transit routes and timing to avoid other subsistence use areas and communicating with coastal communities before operating in or passing through these areas; and
- Conducting pre-season sound propagation modeling to establish the appropriate exclusion and behavioral radii.

Shell indicates that the potential disturbance of marine mammals during operations will be minimized further through the implementation of several ship-based mitigation measures, which include establishing and monitoring safety and disturbance zones and shutting down activities for a portion of the open-water season.

Exclusion radii for marine mammals around sound sources are customarily defined as the distances within which received sound levels are greater than or equal to 180 dB re 1 µPa (rms) for cetaceans and greater than or equal to 190 dB re 1 µPa (rms) for pinnipeds. These exclusion criteria are based on an assumption that sounds at lower received levels will not injure these animals or impair their hearing abilities, but that higher received levels might have such effects. It should be understood that marine mammals inside these exclusion zones will not necessarily be injured, as the received sound thresholds which determine these zones were established prior to the current understanding that significantly higher levels of sound would be required before injury could occur (see Southall *et al.,* 2007). With respect to Level B harassment, NMFS' practice has been to apply the 120 dB re 1 µPa (rms) received level threshold for underwater continuous sound levels and the 160 dB re 1 µPa (rms) received level threshold for underwater impulsive sound levels.

Shell proposes to monitor the various radii in order to implement any mitigation measures that may be necessary. Initial radii for the sound levels produced by the *Kulluk* and *Discoverer,* the icebreaker, and the airguns have been modeled. Measurements taken by Greene (1987a) indicated a broadband source level of 185.5 dB re 1 µPa rms for the *Kulluk.* Measurements taken by Austin and Warner (2010) indicated broadband source levels between 177 and 185 dB re 1 µPa rms for the *Discoverer.* Measurements of the icebreaking supply ship *Robert Lemeur* pushing and breaking ice during exploration drilling operations in the Beaufort Sea in 1986 resulted in an estimated broadband source level of 193 dB re 1 µPa rms (Greene, 1987a; Richardson *et al.,* 1995a). Based on a similar airgun array used in the shallow waters of the Beaufort Sea in 2008 by BP, the source level of the airgun is predicted to be 241.4 dB re 1 µPa rms. Once on location in Camden Bay, Shell will conduct sound source verification (SSV) tests to establish safety zones for the previously mentioned sound level criteria. The objectives of the SSV tests are: (1) To quantify the absolute sound levels produced by drilling and to monitor their variations with time, distance, and direction from the drillship; and (2) to measure the sound levels produced by vessels operating in support of drilling operations, which include crew change vessels, tugs, ice-management vessels, and spill response vessels. The methodology for conducting the SSV tests is fully described in Shell's 4MP (see **ADDRESSES**). Please refer to that document for further details. Upon completion of the SSV tests, the new radii will be established and monitored, and mitigation measures will be implemented in accordance with Shell's 4MP.

Based on the best available scientific literature, the source levels noted earlier in this document and in Shell's 4MP for the drillships are not high enough to cause a temporary reduction in hearing sensitivity or permanent hearing damage to marine mammals. Consequently, Shell believes that mitigation as described for seismic activities including ramp ups, power downs, and shutdowns should not be necessary for drilling activities. NMFS has also determined that these types of mitigation measures, traditionally required for seismic survey operations, are not practical or necessary for this proposed drilling activity. Seismic airgun arrays can be turned on slowly (*i.e.,* only turning on one or some guns at a time) and powered down quickly. The types of sound sources used for exploratory drilling have different properties and are unable to be ''powered down'' like airgun arrays or shutdown instantaneously without posing other risks to operational and human safety. However, Shell plans to use Protected Species Observers (PSOs, formerly referred to as marine mammal observers) onboard the drillship and the various support vessels to monitor marine mammals and their responses to industry activities and to initiate mitigation measures should in-field measurements of the operations indicate that such measures are necessary. Additional details on the PSO program are described in the ''Proposed Monitoring and Reporting'' section found later in this document. Also, for the ZVSP activities, Shell proposes to implement standard mitigation procedures, such as ramp ups, power downs, and shutdowns.

A ramp up of an airgun array provides a gradual increase in sound levels and involves a step-wise increase in the number and total volume of airguns firing until the full volume is achieved. The purpose of a ramp up (or ''soft start'') is to ''warn'' cetaceans and pinnipeds in the vicinity of the airguns and to provide the time for them to leave the area and thus avoid any potential injury or impairment of their hearing abilities.

During the proposed ZVSP surveys, Shell will ramp up the airgun arrays slowly. Full ramp ups (*i.e.,* from a cold start when no airguns have been firing) will begin by firing a single airgun in the array. A full ramp up will not begin until there has been a minimum of 30 minutes of observation of the 180-dB and 190-dB exclusion zones for cetaceans and pinnipeds, respectively, by PSOs to assure that no marine mammals are present. The entire exclusion zone must be visible during the 30-minutes lead-in to a full ramp up. If the entire exclusion zone is not visible, then ramp up from a cold start cannot begin. If a marine mammal(s) is sighted within the exclusion zone during the 30-minutes watch prior to ramp up, ramp up will be delayed until the marine mammal(s) is sighted outside of the applicable exclusion zone or the animal(s) is not sighted for at least 15 minutes for small odontocetes and pinnipeds or 30 minutes for baleen whales.

A power down is the immediate reduction in the number of operating energy sources from all firing to some smaller number. A shutdown is the immediate cessation of firing of all energy sources. The arrays will be

immediately powered down whenever a marine mammal is sighted approaching close to or within the applicable exclusion zone of the full arrays but is outside the applicable exclusion zone of the single source. If a marine mammal is sighted within the applicable exclusion zone of the single energy source, the entire array will be shutdown (*i.e.,* no sources firing). The same 15 and 30 minute sighting times described for ramp up also apply to starting the airguns again after either a power down or shutdown.

Additional mitigation measures proposed by Shell include: (1) Reducing speed and/or changing course if a marine mammal is sighted from a vessel in transit (NMFS has proposed a specific distance in the next subsection); (2) resuming full activity (*e.g.,* full support vessel speed) only after marine mammals are confirmed to be outside the safety zone; (3) implementing flight restrictions prohibiting aircraft from flying below 1,500 ft (457 m) altitude (except during takeoffs and landings or in emergency situations); and (4) keeping vessels anchored when approached by marine mammals to avoid the potential for avoidance reactions by such animals.

Shell has also proposed additional mitigation measures to ensure no unmitigable adverse impact on the availability of affected species or stocks for taking for subsistence uses. Those measures are described in the ''Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses'' section found later in this document.

Additional Mitigation Measures Proposed by NMFS

In addition to the mitigation measures proposed in Shell's IHA application, NMFS proposes the following measures (which apply to vessel operations) be included in the IHA, if issued, in order to ensure the least practicable impact on the affected species or stocks. NMFS proposes to require Shell to avoid multiple changes in direction or speed when within 300 yards (274 m) of whales. Additionally, NMFS proposes to require Shell to reduce speed in inclement weather.

Oil Spill Contingency Plan

In accordance with BOEM regulations, Shell has developed an Oil Discharge Prevention and Contingency Plan (ODPCP) for its Camden Bay exploration drilling program. A copy of this document can be found on the Internet at: *http://www.alaska.boemre.gov/fo/ODPCPs/2010_BF_rev1.pdf.* Additionally, in its Plan of Cooperation (POC), Shell has agreed to several mitigation measures in order to reduce impacts during the response efforts in the unlikely event of an oil spill. Those measures are detailed in the ''*Plan of Cooperation (POC)*'' section found later in this document. The ODPCP is currently under review by the Department of the Interior and other agencies. A final decision on the adequacy of the ODPCP is expected prior to the start of Shell's 2012 Beaufort Sea drilling program.

NMFS has carefully evaluated Shell's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Proposed measures to ensure availability of such species or stock for taking for certain subsistence uses is discussed later in this document (see ''Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses'' section).

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must, where applicable, set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

Monitoring Measures Proposed by Shell

The monitoring plan proposed by Shell can be found in the 4MP (Attachment C of Shell's application; see **ADDRESSES**). The plan may be modified or supplemented based on comments or new information received from the public during the public comment period or from the peer review panel (see the ''Monitoring Plan Peer Review'' section later in this document). A summary of the primary components of the plan follows. Later in this document in the ''Proposed Incidental Harassment Authorization'' section, NMFS lays out the proposed monitoring and reporting conditions, as well as the mitigation conditions, for review, as they would appear in the final IHA (if issued).

(1) Vessel-Based PSOs

Vessel-based monitoring for marine mammals will be done by trained PSOs throughout the period of drilling operations on all vessels. PSOs will monitor the occurrence and behavior of marine mammals near the drillship during all daylight periods during operation and during most daylight periods when drilling operations are not occurring. PSO duties will include watching for and identifying marine mammals, recording their numbers, distances, and reactions to the drilling operations. A sufficient number of PSOs will be required onboard each vessel to meet the following criteria: (1) 100% monitoring coverage during all periods of drilling operations in daylight; (2) maximum of 4 consecutive hours on watch per PSO; and (3) maximum of 12 hours of watch time per day per PSO. Shell anticipates that there will be provision for crew rotation at least every 3–6 weeks to avoid observer fatigue.

Biologist-observers will have previous marine mammal observation experience, and field crew leaders will be highly experienced with previous vessel-based marine mammal monitoring projects. Resumes for those individuals will be provided to NMFS so that NMFS can review and accept their qualifications. Inupiat observers will be experienced in the region, familiar with the marine mammals of the area, and complete a NMFS approved observer training course designed to familiarize individuals with monitoring and data collection procedures. A handbook, adapted for the specifics of the planned Shell drilling program, will be prepared and distributed beforehand to all PSOs.

PSOs will watch for marine mammals from the best available vantage point on the drillship and support vessels. PSOs will scan systematically with the unaided eye and 7×50 reticle binoculars, supplemented with 20×60 image-stabilized Zeiss Binoculars or Fujinon 25×150 ''Big-eye'' binoculars and night-vision equipment when needed. Personnel on the bridge will assist the PSOs in watching for marine mammals. New or inexperienced PSOs will be paired with an experienced PSO or experienced field biologist so that the

quality of marine mammal observations and data recording is kept consistent.

Information to be recorded by PSOs will include the same types of information that were recorded during recent monitoring programs associated with industry activity in the Arctic (*e.g.,* Ireland *et al.,* 2009). The recording will include information about the animal sighted, environmental and operational information, and the position of other vessels in the vicinity of the sighting. The ship's position, speed of support vessels, and water temperature, water depth, sea state, ice cover, visibility, and sun glare will also be recorded at the start and end of each observation watch, every 30 minutes during a watch, and whenever there is a change in any of those variables.

Distances to nearby marine mammals will be estimated with binoculars (Fujinon 7 × 50 binoculars) containing a reticle to measure the vertical angle of the line of sight to the animal relative to the horizon. PSOs may use a laser rangefinder to test and improve their abilities for visually estimating distances to objects in the water. However, previous experience showed that a Class 1 eye-safe device was not able to measure distances to seals more than about 230 ft (70 m) away. The device was very useful in improving the distance estimation abilities of the observers at distances up to about 1968 ft (600 m)—the maximum range at which the device could measure distances to highly reflective objects such as other vessels. Humans observing objects of more-or-less known size via a standard observation protocol, in this case from a standard height above water, quickly become able to estimate distances within about ±20% when given immediate feedback about actual distances during training.

(2) Aerial Survey Program

Shell proposes to conduct an aerial survey program in support of the drilling program in the Beaufort Sea during the summer and fall of 2012. Shell's objectives for this program include:

(A) To advise operating vessels as to the presence of marine mammals (primarily cetaceans) in the general area of operation;

(B) To collect and report data on the distribution, numbers, movement and behavior of marine mammals near the drilling operations with special emphasis on migrating bowhead whales;

(C) To support regulatory reporting related to the estimation of impacts of drilling operations on marine mammals;

(D) To investigate potential deflection of bowhead whales during migration by documenting how far east of drilling operations a deflection may occur and where whales return to normal migration patterns west of the operations; and

(E) To monitor the accessibility of bowhead whales to Inupiat hunters.

Aerial survey flights will begin 5 to 7 days before operations at the exploration well sites get underway. Surveys will be flown daily throughout drilling operations, weather and flight conditions permitting, and continue for 5 to 7 days after all activities at the site have ended.

The aerial survey procedures will be generally consistent with those used during earlier industry studies (Davis *et al.,* 1985; Johnson *et al.,* 1986; Evans *et al.,* 1987; Miller *et al.,* 1997, 1998, 1999, 2002; Patterson, 2007). This will facilitate comparison and pooling of data where appropriate. However, the specific survey grids will be tailored to Shell's operations. During the 2012 drilling season, Shell will coordinate and cooperate with the aerial surveys conducted by BOEMRE/NMFS and any other groups conducting surveys in the same region.

For marine mammal monitoring flights, aircraft will be flown at approximately 120 knots (138 mph) ground speed and usually at an altitude of 1,000 ft (305 m). Surveys in the Beaufort Sea are directed at bowhead whales, and an altitude of 900–1,000 ft (274–305 m) is the lowest survey altitude that can normally be flown without concern about potential aircraft disturbance. Aerial surveys at an altitude of 1,000 ft (305 m) do not provide much information about seals but are suitable for both bowhead and beluga whales. The need for a 900–1000+ (374–305 m) ft cloud ceiling will limit the dates and times when surveys can be flown.

Two primary observers will be seated at bubble windows on either side of the aircraft, and a third observer will observe part time and record data the rest of the time. All observers need bubble windows to facilitate downward viewing. For each marine mammal sighting, the observer will dictate the species, number, size/age/sex class when determinable, activity, heading, swimming speed category (if traveling), sighting cue, ice conditions (type and percentage), and inclinometer reading to the marine mammal into a digital recorder. The inclinometer reading will be taken when the animal's location is 90° to the side of the aircraft track, allowing calculation of lateral distance from the aircraft trackline.

Transect information, sighting data and environmental data will be entered into a GPS-linked computer by the third observer and simultaneously recorded on digital voice recorders for backup and validation. At the start of each transect, the observer recording data will record the transect start time and position, ceiling height (ft), cloud cover (in 10ths), wind speed (knots), wind direction (°T) and outside air temperature (°C). In addition, each observer will record the time, visibility (subjectively classified as excellent, good, moderately impaired, seriously impaired or impossible), sea state (Beaufort wind force), ice cover (in 10ths) and sun glare (none, moderate, severe) at the start and end of each transect, and at 2 min intervals along the transect. The data logger will automatically record time and aircraft position (latitude and longitude) for sightings and transect waypoints, and at pre-selected intervals along the transects. Ice observations during aerial surveys will be recorded and satellite imagery may be used, where available, during post-season analysis to determine ice conditions adjacent to the survey area. These are standard practices for surveys of this type and are necessary in order to interpret factors responsible for variations in sighting rates.

During the late summer and fall, the bowhead whale is the primary species of concern, but belugas and gray whales are also present. To address concerns regarding deflection of bowheads at greater distances, the survey pattern around drilling operations has been designed to document whale distribution from about 25 mi (40 km) east of the drilling operations to about 37 mi (60 km) west of operations (see Figure 1 of Shell's 4MP).

Bowhead whale movements during the late summer/autumn are generally from east to west, and transects should be designed to intercept rather than parallel whale movements. The transect lines in the grid will be oriented north-south, equally spaced at 5 mi (8 km) and randomly shifted in the east-west direction for each survey by no more than the transect spacing. The survey grid will total about 808 mi (1,300 km) in length, requiring approximately 6 hours to survey at a speed of 120 knots (138 mph), plus ferry time. Exact lengths and durations will vary somewhat depending on the position of the drilling operation and thus of the grid, the sequence in which lines are flown (often affected by weather), and the number of refueling/rest stops.

Weather permitting, transects making up the grid in the Beaufort Sea will be flown in sequence from west to east. This decreases difficulties associated

with double counting of whales that are (predominantly) migrating westward. The survey sequence around the drilling operation is designed to monitor the distribution of whales around the drilling operation.

Shell's 4MP provides an explanation about the importance of statistical power in the sampling design and how the aerial survey data will be analyzed. Please refer to the 4MP for that information (see **ADDRESSES**).

(3) Acoustic Monitoring

Shell will conduct SSV tests to establish the isopleths for the applicable exclusion radii, mostly to be employed during the ZVSP surveys. In addition, Shell proposes to use acoustic recorders to study bowhead deflections.

Drilling Sound Measurements—Drilling sounds are expected to vary significantly with time due to variations in the level of operations and the different types of equipment used at different times onboard the *Kulluk* or *Discoverer.* The objectives of these measurements are:

(1) To quantify the absolute sound levels produced by drilling and to monitor their variations with time, distance, and direction from the drilling vessel;

(2) to measure the sound levels produced by vessels operating in support of exploration drilling operations. These vessels will include crew change vessels, tugs, icebreakers, and OSRVs; and

(3) to measure the sound levels produced by an end-of-hole ZVSP survey, using a stationary sound source.

The *Kulluk* or *Discoverer,* support vessels, and ZVSP sound measurements will be performed using one of two methods, both of which involve real-time monitoring. The first method would involve use of bottom-founded hydrophones cabled back to the *Kulluk* or *Discoverer* (see Figure 2 in Shell's 4MP). These hydrophones would be positioned between 1,640 ft (500 m) and 3,281 ft (1,000 m) from the *Kulluk* or *Discoverer,* depending on the final positions of the anchors used to hold the *Kulluk* or *Discoverer* in place. Hydrophone cables would be fed to real-time digitization systems onboard. In addition to the cabled system, a separate set of bottom-founded hydrophones (see Figure 3 in Shell's 4MP) may be deployed at various distances from the exploration drilling operation for storage of acoustic data to be retrieved and processed at a later date.

As an alternative to the cabled hydrophone system (and possible inclusion of separate bottom-founded hydrophones), the second (or alternative) monitoring method would involve a radio buoy approach deploying four sparbuoys 4–5 mi (6–8 km) from the *Kulluk* or *Discoverer.* Additional hydrophones may be deployed closer to the *Kulluk* or *Discoverer,* if necessary, to better determine sound source levels. Monitoring personnel and recording/receiving equipment would be onboard one of the support vessels with 24-hr monitoring capacity. The system would allow for collection and processing of real-time data similar to that provided by the cabled system but from a wider range of locations.

Sound level monitoring with either method will occur on a continuous basis throughout all exploration drilling activities. Both types of systems will be set to record digital acoustic data at a sample rate of 32 kHz, providing useful acoustic bandwidth to at least 15 kHz. These systems are capable of measuring absolute broadband sound levels between 90 and 180 dB re 1 μPa. The long duration recordings will capture many different operations performed from the drillship. Retrieval of these systems will occur following completion of the exploration drilling activities.

These recorders will provide a capability to examine sound levels produced by different drilling activities and practices. This system will not have the capability to locate calling marine mammals and will indicate only relative proximity. The system will be evaluated during operations for its potential to improve PSO observations through notification of PSOs on vessel and aircraft of high levels of call detections and their general locations.

The deployment of drilling sound monitoring equipment will occur as soon as possible once the drillship is on site. Activity logs of exploration drilling operations and nearby vessel activities will be maintained to correlate with these acoustic measurements. This equipment will also be used to take measurements of the support vessels and airguns. Additional details can be found in Shell's 4MP.

Shell plans to deploy arrays of acoustic recorders in the Beaufort Sea in 2012, similar to that which was done in 2007 through 2010 using Directional Autonomous Seafloor Acoustic Recorders (DASARs). These directional acoustic systems permit localization of bowhead whale and other marine mammal vocalizations. The purpose of the array will be to further understand, define, and document sound characteristics and propagation resulting from vessel-based drilling operations that may have the potential to cause deflections of bowhead whales from their migratory pathway. Of particular interest will be the east-west extent of deflection, if any (*i.e.,* how far east of a sound source do bowheads begin to deflect and how far to the west beyond the sound source does deflection persist). Of additional interest will be the extent of offshore (or towards shore) deflection that might occur.

In previous work around seismic and drillship operations in the Alaskan Beaufort Sea, the primary method for studying this question has been aerial surveys. Acoustic localization methods will provide supplementary information for addressing the whale deflection question. Compared to aerial surveys, acoustic methods have the advantage of providing a vastly larger number of whale detections, and can operate day or night, independent of visibility, and to some degree independent of ice conditions and sea state—all of which prevent or impair aerial surveys. However, acoustic methods depend on the animals to call, and to some extent, assume that calling rate is unaffected by exposure to industrial noise. Bowheads call frequently in fall, but there is some evidence that their calling rate may be reduced upon exposure to industrial sounds, complicating interpretation. The combined use of acoustic and aerial survey methods will provide a suite of information that should be useful in assessing the potential effects of drilling operations on migrating bowhead whales.

Using passive acoustics with directional autonomous recorders, the locations of calling whales will be observed for a 6- to 10-week continuous monitoring period at five coastal sites (subject to favorable ice and weather conditions). Essential to achieving this objective is the continuous measurement of sound levels near the drillship.

Shell plans to conduct the whale migration monitoring using the passive acoustics techniques developed and used successfully since 2001 for monitoring the migration past Northstar production island northwest of Prudhoe Bay and from Kaktovik to Harrison Bay during the 2007 through 2011 migrations. Those techniques involve using DASARs to measure the arrival angles of bowhead calls at known locations, then triangulating to locate the calling whale.

In attempting to assess the responses of bowhead whales to the planned industrial operations, it will be essential to monitor whale locations at sites both near and far from industry activities. Shell plans to monitor at five sites along the Alaskan Beaufort coast as shown in

Figure 9 of Shell's 4MP. The eastern-most site (#5 in Figure 9 of the 4MP) will be just east of Kaktovik (approximately 62 mi [100 km] west of the Sivulliq drilling area) and the western-most site (#1 in Figure 10 of the 4MP) will be in the vicinity of Harrison Bay (approximately 109 mi [175 km] west of Sivulliq) . Site 2 will be located west of Prudhoe Bay (approximately 68 mi [110 km] west of Sivulliq). Site 4 will be approximately 6.2 mi (10 km) east of the Sivulliq drilling area, and site 3 will be approximately 15.5 mi (25 km) west of Sivulliq. These five sites will provide information on possible migration deflection well in advance of whales encountering an industry operation and on ''recovery'' after passing such operations should a deflection occur.

The proposed geometry of DASARs at each site is comprised of seven DASARs oriented in a north-south pattern so that five equilateral triangles with 4.3-mi (7-km) element spacing is achieved. DASARs will be installed at planned locations using a GPS. However, each DASAR's orientation once it settles on the bottom is unknown and must be determined to know how to reference the call angles measured to the whales. Also, the internal clocks used to sample the acoustic data typically drift slightly, but linearly, by an amount up to a few seconds after 6 weeks of autonomous operation. Knowing the time differences within a second or two between DASARs is essential for identifying identical whale calls received on two or more DASARs. Bowhead migration begins in late August with the whales moving westward from their feeding sites in the Canadian Beaufort Sea. It continues through September and well into October. However, because of the drilling schedule, Shell will attempt to install the 21 DASARs at three sites (3, 4 and 5) in early August. The remaining 14 DASARs will be installed at sites 1 and 2 in late August. Thus, Shell proposes to be monitoring for whale calls from before August 15 until sometime before October 15.

At the end of the season, the fourth DASAR in each array will be refurbished, recalibrated, and redeployed to collect data through the winter. The other DASARs in the arrays will be recovered. The redeployed DASARs will be programmed to record 35 min every 3 hours with a disk capacity of 10 months at that recording rate. This should be ample space to allow over-wintering from approximately mid-October 2012, through mid-July 2013.

Additional details on methodology and data analysis for the three types of monitoring described here (*i.e.,* vessel-based, aerial, and acoustic) can be found in the 4MP in Shell's application (see **ADDRESSES**).

Monitoring Plan Peer Review

The MMPA requires that monitoring plans be independently peer reviewed ''where the proposed activity may affect the availability of a species or stock for taking for subsistence uses'' (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state, ''Upon receipt of a complete monitoring plan, and at its discretion, [NMFS] will either submit the plan to members of a peer review panel for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan'' (50 CFR 216.108(d)).

NMFS has established an independent peer review panel to review Shell's 4MP for Exploration Drilling of Selected Lease Areas in the Alaskan Beaufort Sea in 2012. The panel is scheduled to meet in early January 2012, and will provide comments to NMFS shortly after they meet. After completion of the peer review, NMFS will consider all recommendations made by the panel, incorporate appropriate changes into the monitoring requirements of the IHA (if issued), and publish the panel's findings and recommendations in the final IHA notice of issuance or denial document.

Reporting Measures

(1) SSV Report

A report on the preliminary results of the acoustic verification measurements, including as a minimum the measured 190-, 180-, 160-, and 120-dB (rms) radii of the drillship, support vessels, and airgun array will be submitted within 120 hr after collection and analysis of those measurements at the start of the field season or in the case of the airgun once that part of the program is implemented. This report will specify the distances of the exclusion zones that were adopted for the exploratory drilling program. Prior to completion of these measurements, Shell will use the radii outlined in their application and elsewhere in this document.

(2) Technical Reports

The results of Shell's 2012 Camden Bay exploratory drilling monitoring program (*i.e.,* vessel-based, aerial, and acoustic) will be presented in the ''90-day'' and Final Technical reports, as required by NMFS under the proposed IHA. Shell proposes that the Technical Reports will include: (1) Summaries of monitoring effort (*e.g.,* total hours, total distances, and marine mammal distribution through study period, accounting for sea state and other factors affecting visibility and detectability of marine mammals); (2) analyses of the effects of various factors influencing detectability of marine mammals (*e.g.,* sea state, number of observers, and fog/glare); (3) species composition, occurrence, and distribution of marine mammal sightings, including date, water depth, numbers, age/size/gender categories (if determinable), group sizes, and ice cover; (4) sighting rates of marine mammals during periods with and without drilling activities (and other variables that could affect detectability); (5) initial sighting distances versus drilling state; (6) closest point of approach versus drilling state; (7) observed behaviors and types of movements versus drilling state; (8) numbers of sightings/individuals seen versus drilling state; (9) distribution around the drillship and support vessels versus drilling state; and (10) estimates of take by harassment. This information will be reported for both the vessel-based and aerial monitoring.

Analysis of all acoustic data will be prioritized to address the primary questions, which are to: (a) Determine when, where, and what species of animals are acoustically detected on each DASAR; (b) analyze data as a whole to determine offshore bowhead distributions as a function of time; (c) quantify spatial and temporal variability in the ambient noise; and (d) measure received levels of drillship activities. The bowhead detection data will be used to develop spatial and temporal animal distributions. Statistical analyses will be used to test for changes in animal detections and distributions as a function of different variables (*e.g.,* time of day, time of season, environmental conditions, ambient noise, vessel type, operation conditions).

The initial technical report is due to NMFS within 90 days of the completion of Shell's Beaufort Sea exploratory drilling program. The ''90-day'' report will be subject to review and comment by NMFS. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS.

(3) Comprehensive Report

Following the 2012 drilling season, a comprehensive report describing the vessel-based, aerial, and acoustic monitoring programs will be prepared. The comprehensive report will describe the methods, results, conclusions and limitations of each of the individual data sets in detail. The report will also integrate (to the extent possible) the studies into a broad based assessment of

industry activities, and other activities that occur in the Beaufort and/or Chukchi seas, and their impacts on marine mammals during 2012. The report will help to establish long-term data sets that can assist with the evaluation of changes in the Chukchi and Beaufort Sea ecosystems. The report will attempt to provide a regional synthesis of available data on industry activity in offshore areas of northern Alaska that may influence marine mammal density, distribution and behavior.

(4) Notification of Injured or Dead Marine Mammals

Shell will be required to notify NMFS' Office of Protected Resources and NMFS' Stranding Network of any sighting of an injured or dead marine mammal. Based on different circumstances, Shell may or may not be required to stop operations upon such a sighting. Shell will provide NMFS with the species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available). The specific language for what Shell must do upon sighting a dead or injured marine mammal can be found in the ''Proposed Incidental Harassment Authorization'' section of this document.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) Has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment]. Only take by Level B behavioral harassment is anticipated as a result of the proposed drilling program. Noise propagation from the drillship, associated support vessels (including during icebreaking if needed), and the airgun array are expected to harass, through behavioral disturbance, affected marine mammals species or stocks. Additional disturbance to marine mammals may result from aircraft overflights and visual disturbance of the drillship or support vessels. However, based on the flight paths and altitude, impacts from aircraft operations are anticipated to be localized and minimal in nature.

The full suite of potential impacts to marine mammals from various industrial activities was described in detail in the ''Potential Effects of the Specified Activity on Marine Mammals'' section found earlier in this document. The potential effects of sound from the proposed exploratory drilling program might include one or more of the following: tolerance; masking of natural sounds; behavioral disturbance; non-auditory physical effects; and, at least in theory, temporary or permanent hearing impairment (Richardson *et al.,* 1995a). As discussed earlier in this document, NMFS estimates that Shell's activities will most likely result in behavioral disturbance, including avoidance of the ensonified area or changes in speed, direction, and/or diving profile of one or more marine mammals. For reasons discussed previously in this document, hearing impairment (TTS and PTS) is highly unlikely to occur based on the fact that most of the equipment to be used during Shell's proposed drilling program does not have source levels high enough to elicit even mild TTS and/or the fact that certain species are expected to avoid the ensonified areas close to the operations. Additionally, non-auditory physiological effects are anticipated to be minor, if any would occur at all. Finally, based on the proposed mitigation and monitoring measures described earlier in this document and the fact that the back-propagated source levels for the drillships proposed to be used are estimated to be between 177 and 185 dB re 1 μPa (rms), no injury or mortality of marine mammals is anticipated as a result of Shell's proposed exploratory drilling program.

For continuous sounds, such as those produced by drilling operations and during icebreaking activities, NMFS uses a received level of 120-dB (rms) to indicate the onset of Level B harassment. For impulsive sounds, such as those produced by the airgun array during the ZVSP surveys, NMFS uses a received level of 160-dB (rms) to indicate the onset of Level B harassment. Shell provided calculations for the 120-dB isopleths produced by both the *Kulluk* and the *Discoverer* and by the icebreaker during icebreaking activities and then used those isopleths to estimate takes by harassment. Additionally, Shell provided calculations for the 160-dB isopleth produced by the airgun array and then used that isopleth to estimate takes by harassment. Shell provides a full description of the methodology used to estimate takes by harassment in its IHA application (see **ADDRESSES**), which is also provided in the following sections.

Shell has requested authorization to take bowhead, gray, and beluga whales, harbor porpoise, and ringed, spotted, bearded, and ribbon seals incidental to exploration drilling, ice management/icebreaking, and ZVSP activities. Additionally, Shell provided exposure estimates and requested takes of narwhal. However, as stated previously in this document, sightings of this species are rare, and the likelihood of occurrence of narwhals in the proposed drilling area is minimal. Therefore, NMFS has not proposed to authorize take for narwhals.

Basis for Estimating ''Take by Harassment''

''Take by Harassment'' is described in this section and was calculated in Shell's application by multiplying the expected densities of marine mammals that may occur near the exploratory drilling operations by the area of water likely to be exposed to continuous, non-pulse sounds ≥120 dB re 1 μPa (rms) during drillship operations or icebreaking activities and impulse sounds ≥160 dB re 1 μPa (rms) created by seismic airguns during ZVSP activities. The single exception to this method is for the estimation of exposures of bowhead whales during the fall migration where more detailed data were available, allowing an alternate approach, described below, to be used. NMFS evaluated and critiqued the methods provided in Shell's application and determined that they were appropriate. This section describes the estimated densities of marine mammals that may occur in the project area. The area of water that may be ensonified to the above sound levels is described further in the ''*Estimated Area Exposed to Sounds >120 dB or >160 dB re 1 μPa rms*'' subsection.

Marine mammal densities near the operation are likely to vary by season and habitat. However, sufficient published data allowing the estimation of separate densities during summer (July and August) and fall (September and October) are only available for beluga and bowhead whales. As noted above, exposures of bowhead whales during the fall are not calculated using densities (see below). Therefore, summer and fall densities have been estimated for beluga whales, and a summer density has been estimated for bowhead whales. Densities of all other species have been estimated to represent the duration of both seasons.

Marine mammal densities are also likely to vary by habitat type. In the Alaskan Beaufort Sea, where the

continental shelf break is relatively close to shore, marine mammal habitat is often defined by water depth. Bowhead and beluga occurrence within nearshore (0–131 ft, 0–40 m), outer continental shelf (131–656 ft, 40–200 m), slope (656–6,562 ft, 200–2000 m), basin (>6,562 ft, 2000 m), or similarly defined habitats have been described previously (Moore *et al.,* 2000; Richardson and Thomson, 2002). The presence of most other species has generally only been described relative to the entire continental shelf zone (0–656 ft, 0–200 m) or beyond. Sounds produced by the drilling vessel and the seismic airguns are expected to drop below 120 dB and 160 dB, respectively, within the nearshore zone (0–131 ft, 0–40 m, water depth) while sounds produced by ice management/icebreaking activities, if they are necessary, are likely to also be present in the outer continental shelf (131–656 ft, 40–200 m).

In addition to water depth, densities of marine mammals are likely to vary with the presence or absence of sea ice (see later for descriptions by species). At times during either summer or fall, pack-ice may be present in some of the area around the drilling operation. However, the retreat of sea ice in the Alaskan Beaufort Sea has been substantial in recent years, so Shell has assumed that only 33% of the area exposed to sounds ≥120 dB or ≥160 dB by the proposed activities will be in ice margin habitat. Therefore, ice-margin densities of marine mammals in both seasons have been multiplied by 33% of the area exposed to sounds by the drilling vessel and ZVSP activities, while open-water (nearshore) densities have been multiplied by the remaining 67% of the area.

To provide some allowance for the uncertainties, ''maximum estimates'' as well as ''average estimates'' of the numbers of marine mammals potentially affected have been derived. For a few marine mammal species, several density estimates were available, and in those cases the mean and maximum estimates were determined from the survey data. In other cases, no applicable estimate (or perhaps a single estimate) was available, so correction factors were used to arrive at ''average'' and ''maximum'' estimates. These are described in detail in the following subsections. NMFS has determined that the average density data of marine mammal populations will be used to calculate estimated take numbers because these numbers are based on surveys and monitoring of marine mammals in the vicinity of the proposed project area. Table 6–12 in Shell's application indicates that the ''average estimate'' for gray whales, harbor porpoise, and ribbon seal is zero. Therefore, to account for the fact that these species listed as being potentially taken by harassment in this document may occur in Shell's proposed drilling sites during active operations, NMFS either used the ''maximum estimates'' or made an estimate based on typical group size for a particular species.

Detectability bias, quantified in part by $f(0)$, is associated with diminishing sightability with increasing lateral distance from the trackline. Availability bias [$g(0)$] refers to the fact that there is <100% probability of sighting an animal that is present along the survey trackline. Some sources of densities used below included these correction factors in their reported densities. In other cases the best available correction factors were applied to reported results when they had not been included in the reported data (*e.g.,* Moore *et al.,* 2000).

(1) Cetaceans

As noted above, the densities of beluga and bowhead whales present in the Beaufort Sea are expected to vary by season and location. During the early and mid-summer, most belugas and bowheads are found in the Canadian Beaufort Sea and Amundsen Gulf or adjacent areas. Low numbers are found in the eastern Alaskan Beaufort Sea. Belugas begin to move across the Alaskan Beaufort Sea in August, and bowheads do so toward the end of August.

Beluga Whales—Summer beluga density estimates were derived from survey data in Moore *et al.* (2000). During the summer, beluga whales are most likely to be encountered in offshore waters of the eastern Alaskan Beaufort Sea or areas with pack ice. The summer beluga whale nearshore density (Table 6–1 in Shell's application and Table 2 here) was based on 7,447 mi (11,985 km) of on-transect effort and nine associated sightings that occurred in water ≤164 ft (50 m) in Moore *et al.* (2000). A mean group size of 1.63, a $f(0)$ value of 2.841, and a $g(0)$ value of 0.58 from Harwood *et al.* (1996) were also used in the calculation. Moore *et al.* (2000) found that belugas were equally likely to occur in heavy ice conditions as open-water or very light ice conditions in summer in the Beaufort Sea, so the same density was used for both nearshore and ice-margin estimates (Table 6–1 in Shell's application and Table 2 here). The fall beluga whale nearshore density was calculated by using 8,808 mi (14,175 km) of on-transect effort and seven associated sightings that occurred in Bowhead Whale Aerial Survey Program (BWASP) survey blocks 1, 4, and 5 in 2006–2009 (Clarke *et al.,* 2011a,b; pers. comm. J. Clarke and M. Ferguson, 2011). A mean group size of 2.9 (CV = 1.9), calculated from those 7 reported sightings, along with the same $f(0)$ and $g(0)$ values from Harwood *et al.* (1996), were used in the density calculation. Moore *et al.* (2000) found that during the fall in the Beaufort Sea belugas occurred in moderate to heavy ice at higher rates than in light ice, so ice-margin densities were estimated to be twice the nearshore densities. Based on the CV of group size maximum estimates in both season and habitats were estimated as four times the average estimates. ''Takes by harassment'' of beluga whales during the fall in the Beaufort Sea were not calculated in the same manner as described for bowhead whales because of the relatively lower expected densities of beluga whales in nearshore habitat near the exploration drilling program and the lack of detailed data on the likely timing and rate of migration through the area.

Table 2. Expected Summer (July-August) and Fall (September-October) Densities of Beluga and Bowhead Whales in the Eastern Alaskan Beaufort Sea. Densities are corrected for f(0) and g(0) biases. Species listed under the ESA as endangered are shown in italics.

	Nearshore		Ice Margin	
Season Species	Average Density (# / km^2)	Maximum Density (# / km^2)	Average Density (# / km^2)	Maximum Density (# / km^2)
Summer				
Beluga	0.0030	0.0120	0.0030	0.0120
Bowhead whale	0.0186	0.0717	0.0186	0.0717
Fall				
Beluga	0.0035	0.0140	0.0070	0.0280
Bowhead whale	*N/A*	*N/A*	*N/A*	*N/A*

Bowhead Whales—Eastward migrating bowhead whales were recorded during industry aerial surveys of the continental shelf near Camden Bay in 2008 until July 12 (Christie *et al.,* 2010). No bowhead sightings were recorded again, despite continued flights until August 19. Aerial surveys by industry operators did not begin until late August of 2006 and 2007, but in both years bowheads were also recorded in the region before the end of August (Lyons *et al.,* 2009). The late August sightings were likely of bowheads beginning their fall migration, so the densities calculated from those surveys were not used to estimate summer densities in this region. The three surveys in July 2008, resulted in density estimates of 0.0038, 0.0277, and 0.0072 bowhead whales/mi^2 (0.0099, 0.0717, and 0.0186 whales/km^2), respectively (Christie *et al.,* 2010). The estimate of 0.0072 bowhead whales/mi^2 (0.0186 whales/km^2) was used as the average summer nearshore density, and the estimate of 0.0277 bowhead whales/mi^2 (0.0717 whales/km^2) was used as the maximum (see Table 6–1 in Shell's application and Table 2 here). Sea ice was not present during these surveys. Moore *et al.* (2000) reported that bowhead whales in the Alaskan Beaufort Sea were distributed uniformly relative to sea ice, so the same nearshore densities were used for ice-margin habitat.

During the fall, most bowhead whales will be migrating west past the exploration drilling program, so it is less accurate to assume that the number of individuals present in the area from one day to the next will be static. However, feeding, resting, and milling behaviors are not entirely uncommon at this time and location. In order to incorporate the movement of whales past the planned operations, and because the necessary data are available, Shell developed an alternate method of calculating the number of individual bowheads exposed to sounds produced by the exploration drilling program from the method used to calculate the number of exposures for bowheads in summer and the other marine mammal species for the entire season. The method is founded on estimates of the proportion of the population that would pass within the ≥120 dB or ≥160 dB zones on a given day in the fall during the exploration drilling or ZVSP surveys.

Based on data in Richardson and Thomson (2002), the number of whales expected to pass each day after conclusion of the bowhead subsistence hunts (assumed to be September 15 for purposes of these calculations) was estimated as a proportion of the estimated 2012 bowhead whale population. The number of whales passing each day was based on the 10-day moving average presented by Richardson and Thomson (2002; Appendix 9.1). Richardson and Thomson (2002) also calculated the proportion of animals within water depth bins (<66 ft [20 m], 66–131 ft [20–40 m], 131–656 ft [40–200 m], >656 ft [200 m]). Using this information, Shell multiplied the total number of whales expected to pass the exploration drilling program each day by the proportion of whales that would be in each depth category to estimate how many individuals would be within each depth bin on a given day. The proportion of each depth bin falling within the ≥120 dB zone was then multiplied by the number of whales within the respective bins to estimate the total number of individuals that would be exposed on each day of exploration drilling or program activity, if they showed no avoidance of the operations. Based on the fact that most bowhead whales will be engaged in the fall migration at this time, NMFS determined that this method was appropriate for estimating the number of individual bowhead whales that may be exposed to drilling sounds after September 15.

Exploration drilling will be suspended on August 25 prior to the start of the bowhead subsistence hunts at Kaktovik and Nuiqsut (Cross Island) and will be resumed when the hunts are concluded. After the completion of the subsistence hunts (for purposes of these calculations this was assumed to be September 15), exploration drilling activity would resume and continue as late as October 31. Therefore, the daily calculations described above were repeated for all days from September 15 to October 31, and the results were summed to estimate the total number of bowhead whales that might be exposed to either continuous sounds ≥120 dB rms from exploration drilling or icebreaking activities and impulsive sounds ≥160 dB rms from ZVSP surveys during the migration period in the Beaufort Sea.

The 2012 bowhead whale population size would be approximately 15,232 individuals based on a 2001 population of 10,545 (Zeh and Punt, 2005) and a continued annual growth rate of 3.4% (Allen and Angliss, 2011). The estimated population size of 15,232 was therefore used by Shell as the foundation of the calculations of exposures during the migration period. The estimate of the proportion of the population passing the exploration drilling operation on each day is based on a 10-day moving average, and the calculations have been made over a substantial length of time, so it would take significant variation in the timing

or nature of the migration to substantially deviate from the estimate calculated in this manner. Nonetheless, if a large portion of the migration were to be delayed or otherwise distributed closer to the area of the exploration drilling operations, more than the estimated number of whales could be exposed. Therefore, a maximum estimate of 2 times the average estimate has been calculated, although it is unlikely that a substantial enough variation in the migration timing and location would cause such an increase in the number of whales present near the operations. If the hunts at Kaktovik and Cross Island (Nuiqsut) end later than September 15, then the number of exposures calculated by Shell would be an overestimate, as Shell would still need to end active operations by October 31 because of the increased chance of additional ice covering the drill sites later in the season.

Gray Whales—For gray whales, densities are likely to vary somewhat by season, but differences are not expected to be great enough to require estimation of separate densities for the two seasons. Gray whales are not expected to be present in large numbers in the Beaufort Sea during the fall but small numbers may be encountered during the summer. They are most likely to be present in nearshore waters. Since this species occurs infrequently in the Beaufort Sea, little to no data are available for the calculation of densities. Minimal densities have therefore been assigned for calculation purpose and to allow for chance encounters (see Table 6–2 in Shell's application and Table 3 here). This table includes density estimates for additional cetacean species; however, for reasons mentioned earlier in this document are not considered for authorization by NMFS.

(2) Pinnipeds

Extensive surveys of ringed and bearded seals have been conducted in the Beaufort Sea, but most surveys have been conducted over the landfast ice, and few seal surveys have occurred in open-water or in the pack ice. Kingsley (1986) conducted ringed seal surveys of the offshore pack ice in the central and eastern Beaufort Sea during late spring (late June). These surveys provide the most relevant information on densities of ringed seals in the ice margin zone of the Beaufort Sea. The density estimate in Kingsley (1986) was used as the average density of ringed seals that may be encountered in the ice margin (Table 6–2 in Shell's application and Table 3 here). The average ringed seal density in the nearshore zone of the Alaskan Beaufort Sea was estimated from results of ship-based surveys at times without seismic operations reported by Moulton and Lawson (2002; Table 6–2 in Shell's application and Table 3 here).

Densities of bearded seals were estimated by multiplying the ringed seal densities by 0.051 based on the proportion of bearded seals to ringed seals reported in Stirling *et al.* (1982; Table 6–2 in Shell's application and Table 3 here). Spotted seal densities in the nearshore zone were estimated by summing the ringed seal and bearded seal densities and multiplying the result by 0.015 based on the proportion of spotted seals to ringed plus bearded seals reported in Moulton and Lawson (2002; Table 6–2 in Shell's application and Table 3 here). Minimal values were assigned as densities in the ice-margin zones (Table 6–2 in Shell's application and Table 3 here). This table also includes density estimates for ribbon seals; however, due to their rarity in the area, this species is not considered for authorization by NMFS.

Table 3. Expected Densities of Cetaceans (Excluding Beluga and Bowhead Whales) and Seals in the Alaskan Beaufort Sea During Both Summer (July-August) and Fall (September-October) Seasons

Species	Nearshore		Ice Margin	
	Average Density (# / km^2)	Maximum Density (# / km^2)	Average Density (# / km^2)	Maximum Density (# / km^2)
Odontocetes				
Monodontidae				
Narwhal	0.0000	0.0000	0.0000	0.0001
Phocoenidae				
Harbor porpoise	0.0001	0.0004	0.0000	0.0000
Mysticetes				
Gray whale	0.0001	0.0004	0.0000	0.0000
Pinnipeds				
Bearded seal	0.0181	0.0724	0.0128	0.0512
Ribbon seal	0.0001	0.0004	0.0001	0.0004
Ringed seal	0.3547	1.4188	0.2510	1.0040
Spotted seal	0.0037	0.0149	0.0001	0.0004

Estimated Area Exposed to Sounds >120 dB or >160 dB re 1 μPa rms

(1) Estimated Area Exposed to Continuous Sounds ≥120 dB rms From the Drillship

Shell proposes that exploration drilling in Camden Bay would be conducted from either the *Kulluk* or the *Discoverer* but not both. The two vessels are likely to introduce somewhat different levels of sound into the water during exploration drilling activities. Descriptions of the expected source levels and propagation distances from the two vessels are provided in this section. These distances and associated ensonified areas are then used in the following section to calculate separate estimates of potential exposures.

Sounds from the *Kulluk* were measured in the Beaufort Sea in 1986 and reported by Greene (1987a). The back propagated broadband source level from the measurements (185.5 dB re 1 μPa • m rms; calculated from the reported 1/3-octave band levels), which included sounds from a support vessel operating nearby, were used to model sound propagation at the Sivulliq prospect near Camden Bay. The model estimated that sounds would decrease to 120 dB rms at approximately 8.25 mi (13.27 km) from the *Kulluk* (JASCO 2007; see Table 6–3 in Shell's application and Table 4 here). As a precautionary approach, Shell multiplied that distance by 1.5, and the resulting radius of 12.37 mi (19.91 km) was used to estimate the total area that may be exposed to continuous sounds ≥120 dB re 1 μPa rms by the *Kulluk* at each drill site. Assuming one well site will be drilled in each season (summer and fall), the total area of water ensonified to ≥120 dB rms in each season would be 481 mi^2 (1,245 km^2).

Table 4. Sound Propagation Modeling Results of Exploration Drilling, Icebreaking, and ZVSP Activities Near Camden Bay in the Alaskan Beaufort Sea

Source	Received Level (dB re 1 μPa)	Modeling Results (km)	Used in Calculations (km)
Kulluk	120	13.27	19.91
Discoverer	120	3.32	4.98
Icebreaking	120	7.63	9.50
ZVS	160	3.67	5.51

Sounds from the *Discoverer* have not previously been measured in the Arctic. However, measurements of sounds produced by the *Discoverer* were made in the South China Sea in 2009 (Austin and Warner, 2010). The results of those measurements were used to model the sound propagation from the *Discoverer* (including a nearby support vessel) at planned exploration drilling locations in the Chukchi and Beaufort seas (Warner and Hannay, 2011). Broadband source levels of sounds produced by the *Discoverer* varied by activity and direction from the ship but were generally between 177 and 185 dB re 1 μPa • m rms (Austin and Warner, 2010). Propagation modeling at the Sivulliq and Torpedo prospects yielded somewhat different results, with sounds expected to propagate shorter distances at the Sivulliq site (Warner and Hannay, 2011). As a precautionary approach, Shell used the larger distance to which sounds ≥120 dB (2.06 mi [3.32 km]) are expected to propagate at the Torpedo site to estimate the area of water potentially exposed at both locations. The estimated (2.06 mi [3.32 km]) distance was multiplied by 1.5 (= 3.09 mi [4.98 km]) as a further precautionary measure before calculating the total area that may be exposed to continuous sounds ≥120 dB re 1 μPa rms by the *Discoverer* at each drill site (see Table 6–3 in Shell's application and Table 4 here). Assuming one well would be drilled in each season (summer and fall), the total area of water ensonified to ≥120 dB rms in each season would be 30 mi^2 (78 km^2). The 160-dB radii for the *Kulluk* and the *Discoverer* were estimated to be approximately 180 ft (55 m) and 33 ft (10 m), respectively. Again, because source levels for the two drillships were measured to be between 177 and 185 dB, the 180 and 190-dB radii were not needed.

The acoustic propagation model used to estimate the sound propagation from both vessels in Camden Bay is JASCO's Marine Operations Noise Model (MONM). MONM computes received sound levels in rms units when source levels are specified also in those units. MONM treats sound propagation in range-varying acoustic environments through a wide-angled parabolic equation solution to the acoustic wave equation. The specific parabolic equation code in MONM is based on the Naval Research Laboratory's Range-dependent Acoustic Model. This code has been extensively benchmarked for accuracy and is widely employed in the underwater acoustics community (Collins, 1993).

For analysis of the potential effects on migrating bowhead whales Shell calculated the total distance perpendicular to the east-west migration corridor ensonified to ≥120 dB rms in order to determine the number of migrating whales passing the activities that might be exposed to that sound level. For the *Kulluk,* that distance is 2 × 12.4 mi (19.9 km) (the estimated radius of the 120 dB rms zone), or 24.7 mi (39.8 km) (*i.e.* 12.4 mi [19.9 km] north and 12.4 mi [19.9 km] south of the drill site); for the *Discoverer,* that distance is 2 × 3.09 mi, or 6.19 mi, (4.98 km or 9.96 km). At the two Sivulliq sites (G and N, which are located close together and positioned similarly relative to the 131 and 656 ft [40 and 200 m] bathymetric contours), the 24.7 mi (39.8 km) distance from the *Kulluk* covers all of the 23 mi (37 km) wide 0–131 ft (0–40 m) water depth category, and approximately 11% of the 22.1 mi (35.5 km) wide 131–656 ft (40–200 m) water depth category. The 9.96 km distance from the *Discoverer* covers 27% of the 0–131 ft (0–40 m) category and none of the 131–656 ft (40–200 m) category at the Sivulliq sites.

The two drill sites on the Torpedo prospect (designated as H and J) are not as close together as the Sivulliq sites, but their position relative to the 131 ft (40 m) and 656 ft (200 m) bathymetric contours are similar. For simplicity, Shell provided and used only the slightly greater estimates resulting from

calculations at the Torpedo ''H'' site to represent activities at either of the two Torpedo sites. At the Torpedo ''H'' site, the 24.7 mi (39.8 km) distance from the *Kulluk* covers approximately 74% of the 37 km wide 0–131 ft (0–40 m) water depth category and approximately 35% of the 22.1 mi (35.5 km) wide 131–656 ft (40–200 m) water depth category. The 6.19 mi (9.96 km) distance from the *Discoverer* covers 27% of the 0–131 ft (0–40 m) category and none of the 131–656 ft (40–200 m) category at either of the Torpedo sites.

As described in the ''*Basis for Estimating 'Take by Harassment'* '' subsection, the percentages of water depth categories described in the previous two paragraphs were multiplied by the estimated proportion of the whales passing within those categories on each day to estimate the number of bowheads that may be exposed to sounds ≥120 dB if they showed no avoidance of the exploration drilling operations.

(2) Estimated Area Exposed to Continuous Sounds ≥120 dB rms From Ice

Management/Icebreaking Activities

Measurements of the icebreaking supply ship *Robert Lemeur* pushing and breaking ice during exploration drilling operations in the Beaufort Sea in 1986 resulted in an estimated broadband source level of 193 dB re 1 μPa • m (Greene, 1987a; Richardson *et al.,* 1995a). Measurements of the icebreaking sounds were made at five different distances and those were used to generate a propagation loss equation [RL=141.4 – 1.65R – 10Log(R) where R is range in kilometers (Greene, 1987a); converting R to meters results in the following equation: R = 171.4 – 10log(R) – 0.00165R]. Using that equation, the estimated distance to the 120 dB threshold for continuous sounds from icebreaking is 4.74 mi (7.63 km). Since the measurements of the *Robert Lemeur* were taken in the Beaufort Sea under presumably similar conditions as would be encountered in 2012, an inflation factor of 1.25 was selected to arrive at a precautionary 120 dB distance of 5.9 mi (9.5 km) for icebreaking sounds (see Table 6–3 in Shell's application and Table 4 here).

If ice is present, ice management/icebreaking activities may be necessary in early July and towards the end of operations in late October, but it is not expected to be needed throughout the proposed exploration drilling season. Icebreaking activities would likely occur in a 40° arc up to 3.1 mi (5 km) upwind of the *Kulluk* or *Discoverer* (see Figure 1–3 and Attachment B in Shell's application for additional details). This activity area plus a 5.9 mi (9.5 km) buffer around it results in an estimated total area of 162 mi^2 (420 km2) that may be exposed to sounds ≥120 dB from ice management/icebreaking activities in each season. Icebreaking is not expected to occur during the bowhead migration since it is only anticipated to be needed either in early July or late October, so additional take estimates during the migration period have not been calculated.

(3) Estimated Area Exposed to Impulsive Sounds ≥160 dB rms From Airguns

Shell proposes to use the ITAGA eight-airgun array for the ZVSP surveys in 2012, which consists of four 150-in^3 airguns and four 40-in^3 airguns for a total discharge volume of 760 in^3. The ≥160 dB re 1 μPa rms radius for this source was estimated from measurements of a similar seismic source used during the 2008 BP Liberty seismic survey (Aerts *et al.,* 2008). The BP liberty source was also an eight-airgun array but had a slightly larger total volume of 880 in^3. Because the number of airguns is the same, and the difference in total volume only results in an estimated 0.4 dB decrease in the source level of the ZVSP source, the 100th percentile propagation model from the measurements of the BP Liberty source is almost directly applicable. However, the BP Liberty source was towed at a depth of 5.9 ft (1.8 m), while Shell's ZVSP source would be lowered to a target depth of 13 ft (4 m) (from 10–23 ft [3–7 m]). The deeper depth of the ZVSP source has the potential to increase the source strength by as much as 6 dB. Thus, the constant term in the propagation equation from the BP Liberty source was increased from 235.4 to 241.4 while the remainder of the equation (–18*LogR—0.0047*R) was left unchanged. NMFS reviewed the use of this equation and the similarities between the 2008 BP Liberty project and Shell's proposed drilling sites and determined that it is appropriate to base the sound isopleths on those results. This equation results in the following estimated distances to maximum received levels: 190 dB = 0.33 mi (524 m); 180 dB = 0.77 mi (1,240 m); 160 dB = 2.28 mi (3,670 m); 120 dB = 6.52 mi (10,500 m). The ≥160 dB distance was multiplied by 1.5 (see Table 6–3 in Shell's application and Table 4 here) for use in estimating the area ensonified to ≥160 dB rms around the drilling vessel during ZVSP activities. Therefore, the total area of water potentially exposed to received sound levels ≥160 dB rms by ZVSP operations at one exploration well sites during each season is estimated to be 73.7 mi^2 (190.8 km^2).

For analysis of potential effects on migrating bowhead whales, the ≥120 dB distance for exploration drilling activities was used on all days during the bowhead migration as described previously. This is a precautionary approach in the case of the *Kulluk* since the ≥160 dB zone for the relatively brief ZVSP surveys is expected to be less than the ≥120 dB distance from the *Kulluk.* If the *Discoverer* were to be used, the slightly greater distance to the ≥160 dB threshold from the ZVSP airguns than the ≥120 dB distance from the *Discoverer* (see Table 6–3 in Shell's application and Table 3 here) would result in only 3% more of the 0–131 ft (0–40 m) depth category being ensonified on up to 2 days. This would result in an estimated increase of approximately 10 bowhead whales compared to the estimates shown in (see Table 6–7 in Shell's application).

Shell intends to conduct sound propagation measurements on the *Kulluk* or *Discoverer* (whichever is used) and the airgun source in 2012 once they are on location near Camden Bay. The results of those measurements would then be used during the season to implement mitigation measures.

Potential Number of ''Takes by Harassment''

Although a marine mammal may be exposed to drilling or icebreaking sounds ≥120 dB (rms) or airgun sounds ≥160 dB (rms), this does not mean that it will *actually* exhibit a disruption of behavioral patterns in response to the sound source. Rather, the estimates provided here are simply the best estimates of the number of animals that potentially could have a behavioral modification due to the noise. However, not all animals react to sounds at this low level, and many will not show strong reactions (and in some cases any reaction) until sounds are much stronger. There are several variables that determine whether or not an individual animal will exhibit a response to the sound, such as the age of the animal, previous exposure to this type of anthropogenic sound, habituation, *etc.*

Numbers of marine mammals that might be present and potentially disturbed (*i.e.,* Level B harassment) are estimated below based on available data about mammal distribution and densities at different locations and times of the year as described previously. Exposure estimates have been calculated based on the use of either the *Kulluk* or *Discoverer* operating in Camden Bay beginning in July, as well

as ice management/icebreaking activities, if needed, and minimal airgun usage (see estimates below). Shell will not conduct any activities associated with the exploration drilling program in Camden Bay during the 2012 Kaktovik and Nuiqsut (Cross Island) fall bowhead whale subsistence harvests. Shell will suspend exploration activities on August 25, prior to the beginning of the hunts, will resume activities in Camden Bay after conclusion of the subsistence harvests, and complete exploration activities on or about October 31, 2012. Actual drilling may occur on approximately 78 days in Camden Bay (which includes the 20–28 hours total needed for airgun operations), approximately half of which would occur before and after the fall bowhead subsistence hunts.

The number of different individuals of each species potentially exposed to received levels of continuous sound ≥120 dB re 1 μPa (rms) or to pulsed sounds ≥160 dB re 1 μPa (rms) within each season and habitat zone was estimated by multiplying:

- The anticipated area to be ensonified to the specified level in the time period and habitat zone to which a density applies, by
- The expected species density.

The estimate for bowhead whales during the migration period was calculated differently as described previously. The numbers of exposures were then summed for each species across the seasons and habitat zones.

At times during either summer (July–August) or fall (September–October), pack-ice may be present in some of the area around the exploration drilling operation. However, the retreat of sea ice in the Alaskan Beaufort Sea has been substantial in recent years, so Shell assumed that only 33% of the area exposed to sounds ≥120 dB or ≥160 dB by the exploration drilling program and ZVSP activities will be in ice-margin habitat. Therefore, ice-margin densities of marine mammals in both seasons have been multiplied by 33% of the area exposed to sounds by the drilling and ZVSP activities, while open-water (nearshore) densities have been multiplied by the remaining 67% of the area. Since any icebreaking activities would only occur in ice-margin habitat, the entire area exposed to sounds ≥120 dB from icebreaking was multiplied by the ice-margin densities.

(1) Cetaceans

Cetacean species potentially exposed to exploration drilling or icebreaking sounds with continuous received levels ≥120 dB rms or airgun sounds ≥160 dB rms may include both mysticetes (bowhead and gray whales) and odontocetes (beluga whale). Separate estimates for beluga and bowhead whales are provided based on whether the *Kulluk* (see Table 6–4 in Shell's application or Table 5 here) or the *Discoverer* (see Table 6–5 in Shell's application or Table 6 here) is used as the drilling vessel in 2012. The results presented in those two tables should not be summed, as the operations will only be conducted from one of the drilling vessels. Estimates from icebreaking activities, should these occur, are shown in Table 6–6 in Shell's application or Table 7 here. Estimates of exposure to airgun pulses from ZVSP activities are provided in Table 6–7 and Table 8 here.

If the *Kulluk* is used, the average estimates of the number of individual belugas and bowheads exposed to continuous sounds ≥120 dB from exploration drilling activities during both summer and fall are 10 and 5,598, respectively (Table 6–4 in Shell's application or Table 5 here). The smaller size of the expected ≥120 dB zone around the *Discoverer* resulted in an average estimate of 0 and 1,388 beluga and bowhead whales potentially being exposed to sounds ≥120 dB during summer and fall, respectively (Table 6–5 in Shell's application and Table 6 here). Should icebreaking activities occur in both seasons, an additional 4 beluga and 8 bowhead whales may be exposed to continuous received sounds ≥120 dB (Table 6–6 in Shell's application and Table 7 here). Because of the relatively small airgun source and short duration of the ZVSP surveys, they are not expected to contribute substantially to the estimated number of belugas and bowheads exposed by the activities (Table 6–7 in Shell's application and Table 8 here). The estimated exposure of bowheads to these sounds during the migration has already been included in the estimates for the *Kulluk (e.g., take of 10 belugas and 5,598 bowheads).* The slightly greater distance to the ≥160 dB threshold from the ZVSP airguns than the ≥120 dB distance from the *Discoverer* would result in only 3% more of the 0–131 ft (0–40 m) depth category being ensonified on up to 2 days. This would result in an estimated increase of approximately 10 bowhead whales from ZVSP activities compared to the estimate shown in (Table 6–5 in Shell's application and Table 6 here).

Few other cetaceans are likely to be present in the area of the planned operations and the very small estimated densities for those species were not large enough for the calculations to result in estimates >1% from the *Kulluk* (Table 6–8 in Shell's application and Table 9 here), *Discoverer* (Table 6–9 in Shell's application and Table 10 here), icebreaking activities (Table 6–10 in Shell's application and Table 11 here), or ZVSP activities (Table 6–11 in Shell's application and Table 12 here).

(2) Seals

The ringed seal is the most widespread and abundant pinniped in ice-covered arctic waters, and there appears to be a great deal of year-to-year variation in abundance and distribution of these marine mammals. As a result of their high abundance, ringed seals account for a large number of marine mammals expected to be encountered during the exploration drilling program and hence exposed to sounds with received levels ≥120 dB or ≥160 dB rms. If the *Kulluk* is used, calculations based on the average density result in an estimate of 798 ringed seals that might be exposed during summer and fall to sounds with received levels ≥120 dB from the exploration drilling program (Table 6–8 in Shell's application and Table 9 here). Should the *Discoverer* be used, the estimated number of ringed seals exposed to ≥120 dB during summer and fall is 49 (Table 6–9 in Shell's application and Table 10 here). If ice management/icebreaking occurred during both seasons, an additional 211 ringed seals may be exposed to continuous sounds ≥120 dB (Table 6–10 in Shell's application and Table 11 here). The ZVSP activities are estimated to expose 60 ringed seals to pulsed airgun sounds ≥160 dB (Table 6–11 in Shell's application and Table 12 here).

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Table5. Estimates of the Number of Beluga and Bowhead Whales in Areas Where Maximum Received Sound Levels in the Water Would be ≥120 dB from Operations Conducted by the Kulluk During Shell's Proposed Exploration Drilling Program in Summer (July-August) and Fall (September-October) near Camden Bay in the Beaufort Sea, Alaska, 2012.

Season	Number of Individuals Exposed to Sound Levels ≥120 dB from *Kulluk*					
	Nearshore		Ice Margin		Total	
Species	Avg.	Max.	Avg.	Max.	Avg.	Max.
Summer						
Beluga	3	10	1	5	4	15
Bowhead whale	16	60	8	29	23	89
Fall						
Beluga	3	12	3	12	6	23
Bowhead whale [a]	5,575	11,150	*N/A*	*N/A*	5,575	11,150

[a] See text for description of bow head w hale estimates for the Fall in the Beaufort Sea

Table 6. Estimates of the Number of Beluga and Bowhead Whales in Areas Where Maximum Received Sound Levels in the Water Would be ≥120 dB from Operations Conducted by the Discoverer During Shell's Proposed Exploration Drilling Program in Summer (July-August) and Fall (September-October) near Camden Bay in the Beaufort Sea, Alaska, 2012.

Season	Number of Individual Exposureds to Sound Levels ≥120 dB from *Discoverer*					
	Nearshore		Ice Margin		Total	
Species	Avg.	Max.	Avg.	Max.	Avg.	Max.
Summer						
Beluga	0	1	0	0	0	5
Bowhead whale	1	4	0	2	1	6
Fall						
Beluga	0	1	0	1	0	5
Bowhead whale [a]	1,387	2,774	*N/A*	*N/A*	1,387	2,774

[a] See text for description of bowhead whale estimates for the Fall in the Beaufort Sea

Table 7. Estimates of the Numbers of Beluga and Bowhead Whales in Areas Where Maximum Received Sound Levels in the Water Would be ≥120 dB from Icebreaking Activities During Shell's Proposed Exploration Drilling Program in Summer (July-August) and Fall (September-October) near Camden Bay in the Beaufort Sea, Alaska, 2012.

Season	Number of Individuals Exposed to Sound Levels ≥120 dB from Icebreaking					
	Nearshore		Ice Margin		Total	
Species	Avg.	Max.	Avg.	Max.	Avg.	Max.
Summer						
Beluga	0	0	1	5	1	5
Bowhead whale	0	0	8	30	8	30
Fall						
Beluga	0	0	3	12	3	12
Bowhead whale[a]	*N/A*	*N/A*	*N/A*	*N/A*	*N/A*	*N/A*

[a] See text for description of bowhead whale estimates for the Fall in the Beaufort Sea.

Table 8. Estimates of the Numbers of Beluga and Bowhead Whales in Areas Where Maximum Received Sound Levels in the Water Would be ≥160 dB from ZVSP Activities During Shell's Proposed Exploration Drilling Program in Summer (July-August) and Fall (September-October) near Camden Bay in the Beaufort Sea, Alaska, 2012.

Season	Number of Individuals Exposed to Sound Levels ≥160 dB from ZVSP					
	Nearshore		Ice Margin		Total	
Species	Avg.	Max.	Avg.	Max.	Avg.	Max.
Summer						
Beluga	0	1	0	0	0	5
Bowhead whale	1	4	1	2	2	7
Fall						
Beluga	0	1	0	1	0	5
Bowhead whale [a]	*N/A*	*N/A*	*N/A*	*N/A*	*N/A*	*N/A*

[a] See text for description of bowhead whale estimates for the Fall in the Beaufort Sea. Estimates for ZVSP activities have been included in the calculations from drilling (Table 6-4 or 6-5)

Table 9. Estimates of the Numbers of Marine Mammals (Excluding Beluga and Bowhead Whales) in Each Offshore Area Where Maximum Received Sound Levels in the Water would be ≥120 dB from the Kulluk during Shell's Proposed Exploration Drilling Program near Camden Bay in the Beaufort Sea, Alaska, 2012.

	Number of Individuals Exposed to Sound Levels ≥120 dB from *Kulluk*					
	Nearshore		Ice Margin		Total	
Species	Avg	Max	Avg	Max	Avg	Max
Odontocetes						
Monodontidae						
Narwhal	0	0	0	0	0	5
Phocoenidae						
Harbor porpoise	0	1	0	0	0	5
Mysticetes						
Gray whale	0	1	0	0	0	5
Pinnipeds						
Bearded seal	30	121	11	42	41	163
Ribbon seal	0	1	0	0	0	5
Ringed seal	592	2367	206	825	798	3192
Spotted seal	6	25	0	0	6	25

Table 10. Estimates of the Numbers of Marine Mammals (Excluding Beluga and Bowhead Whales) in Each Offshore Area Where Maximum Received Sound Levels in the Water would be ≥120 dB from the Discoverer during Shell's Proposed Exploration Drilling Program near Camden Bay in the Beaufort Sea, Alaska, 2012.

	Number of Individulas Exposed to Sound Levels ≥120 dB from *Discoverer*					
	Nearshore		Ice Margin		Total	
Species	Avg	Max	Avg	Max	Avg	Max
Odontocetes						
Monodontidae						
Narwhal	0	0	0	0	0	5
Phocoenidae						
Harbor porpoise	0	0	0	0	0	5
Mysticetes						
Gray whale	0	0	0	0	0	5
Pinnipeds						
Bearded seal	2	7	1	3	3	10
Ribbon seal	0	0	0	0	0	5
Ringed seal	37	146	13	52	49	198
Spotted seal	0	2	0	0	0	5

Table 11. Estimates of the Numbers of Marine Mammals (Excluding Beluga and Bowhead Whales) in Each Offshore Area Where Maximum Received Sound Levels in the Water would be ≥120 dB from Icebreaking during Shell's Proposed Exploration Drilling Program near Camden Bay in the Beaufort Sea, Alaska, 2012.

	Number of Individuals Exposed to Sound Levels≥120 dB from Icebreaking					
	Nearshore		Ice Margin		Total	
Species	Avg	Max	Avg	Max	Avg	Max
Odontocetes						
Monodontidae						
Narwhal	0	0	0	0	0	5
Phocoenidae						
Harbor porpoise	0	0	0	0	0	5
Mysticetes						
Gray whale	0	0	0	0	0	5
Pinnipeds						
Bearded seal	0	0	11	43	11	43
Ribbon seal	0	0	0	0	0	5
Ringed seal	0	0	211	843	211	843
Spotted seal	0	0	0	0	0	5

Table 12. Estimates of the Numbers of Marine Mammals (Excluding Beluga and Bowhead Whales) in Each Offshore Area Where Maximum Received Sound Levels in the Water would be ≥160 dB from ZVSP Activities during Shell's Proposed Exploration Drilling Program near Camden Bay in the Beaufort Sea, Alaska, 2012.

	Number of Individuals Exposed to Sound Levels ≥160 dB from ZVSP					
	Nearshore		Ice Margin		Total	
Species	Avg	Max	Avg	Max	Avg	Max
Odontocetes						
Monodontidae						
Narwhal	0	0	0	0	0	5
Phocoenidae						
Harbor porpoise	0	0	0	0	0	5
Mysticetes						
Gray whale	0	0	0	0	0	5
Pinnipeds						
Bearded seal	2	9	1	3	3	12
Ribbon seal	0	0	0	0	0	5
Ringed seal	44	178	16	63	60	241
Spotted seal	0	2	0	0	0	5

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Two additional seal species are expected to be encountered with lower frequency than ringed seals. Estimates based on average densities of bearded seals and spotted seals are 41 and 6, respectively, during summer and fall if the exploration drilling program is conducted by the *Kulluk* (Table 6–8 in Shell's application and Table 9 here). If the *Discoverer* is used, the estimates are reduced to 3 and 0 for bearded and spotted seals, respectively (Table 6–9 in Shell's application and Table 10 here). Should icebreaking occur in both seasons an additional 11 bearded seals may be exposed to continuous sounds with received levels ≥120 dB (Table 6–10 in Shell's application and Table 11 here). Exposures of individuals from either species to sound levels ≥160 dB from the ZVSP activities are expected to be quite low due to the relative small area expected to be exposed to those sounds (Table 6–11 in Shell's application and Table 12 here). Although only sighted on occasion, ribbon seals may occur in the area, so Shell provided estimates for this species as well.

Estimated Take Conclusions

As stated previously, NMFS' practice has been to apply the 120 dB re 1 μPa (rms) received level threshold for underwater continuous sound levels and the 160 dB re 1 μPa (rms) received level threshold for underwater impulsive sound levels to determine whether take by Level B harassment occurs. However, not all animals react to sounds at these low levels, and many

will not show strong reactions (and in some cases any reaction) until sounds are much stronger. Southall *et al.* (2007) provide a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of anthropogenic sound (see Table 4 in Southall *et al.* (2007)). Tables 15, 17, and 21 in Southall *et al.* (2007) outline the numbers of low-frequency and mid-frequency cetaceans and pinnipeds in water, respectively, reported as having behavioral responses to non-pulses in 10–dB received level increments. These tables illustrate, especially for low- and mid-frequency cetaceans, that more intense observed behavioral responses did not occur until sounds were higher than 120 dB (rms). Many of the animals had no observable response at all when exposed to anthropogenic continuous sound at levels of 120 dB (rms) or even higher.

Although the 120-dB isopleth for the drillships may seem fairly expansive (*i.e.,* 12.37 mi [19.91 km] for the *Kulluk* or 4.6 mi [7.4 km] for the *Discoverer,* which include the 50 percent inflation factor), the zone of ensonification begins to shrink dramatically with each 10-dB increase in received sound level. The 160-dB rms zones for the *Kulluk* and *Discoverer* are estimated to extend approximately 180 ft (55 m) and 33 ft (10 m) for the ship, respectively. As stated previously, source levels for the two different drillships are expected to be between 177 and 185 dB (rms). For an animal to be exposed to received levels between 177 and 185 dB, it would have to be within several meters of the vessel, which is unlikely, especially give the fact that certain species are likely to avoid the area (as described earlier in this document).

For impulsive sounds, such as those produced by the airguns, studies reveal that baleen whales show avoidance responses, which would reduce the likelihood of them being exposed to higher received sound levels. The 180-dB zone (0.77 mi [1.24 km]) is one-third the size of the 160-dB zone (2.28 mi [3.67 km], which is the modeled distance before the 1.5 inflation factor is included). In the limited studies that have been conducted on pinniped responses to pulsed sound sources, they seem to be more tolerant and do not exhibit strong behavioral reactions (see Southall *et al.,* 2007).

NMFS is proposing to authorize the average take estimates provided in Table 6–12 of Shell's application and Table 13 here for bowhead whales and bearded, ringed, and spotted seals. The only exceptions to this are for the gray whale, harbor porpoise, and ribbon seal since the average estimate is zero for those species and for the beluga whale to account for group size. Therefore, for the 2012 Beaufort Sea drilling season, NMFS proposes to authorize the take of 38 beluga whales, 5,608 bowhead whales, 15 gray whales, 15 harbor porpoise, 55 bearded seals, 1,069 ringed seals, 7 spotted seals, and 5 ribbon seals. For beluga and gray whales and harbor porpoise, this represents 0.1% of the Beaufort Sea population of approximately 39,258 beluga whales (Allen and Angliss, 2011), 0.08% of the Eastern North Pacific stock of approximately 18,017 gray whales (Allen and Angliss, 2011), and 0.03% of the Bering Sea stock of approximately 48,215 harbor porpoise (Allen and Angliss, 2011). This also represents 36.8% of the Bering-Chukchi-Beaufort bowhead population of 15,232 individuals assuming 3.4% annual population growth from the 2001 estimate of 10,545 animals (Zeh and Punt, 2005). The take estimates presented for bearded, ringed, and spotted seals represent 0.02%, 0.4%, and 0.01% of the Bering-Chukchi-Beaufort populations for each species, respectively. The take estimate for ribbon seals represents 0.01% of the Alaska stock of this species. These proposed take numbers are based on Shell utilizing the *Kulluk.* Table 13 here also presents the take numbers and percentages of the population if Shell utilizes the *Discoverer* instead, which has a smaller 120-dB radius. If the *Discoverer* is used for drilling operations instead of the *Kulluk,* the take estimates for bowhead whales and ringed and bearded seals drop substantially.

With the exception of the subsistence mitigation measure of shutting down during the Nuiqsut and Kaktovik fall bowhead whale hunts, these take estimates do not take into account any of the mitigation measures described previously in this document. Additionally, if the fall bowhead hunts end after September 15, and Shell still concludes activities on October 31, then fewer animals will be exposed to drilling sounds, especially bowhead whales, as more of them will have migrated past the area in which they would be exposed to continuous sound levels of 120 dB or greater or impulsive sound levels of 160 dB or greater prior to Shell resuming active operations. These take numbers also do not consider how many of the exposed animals may actually respond or react to the proposed exploration drilling program. Instead, the take estimates are based on the presence of animals, regardless of whether or not they react or respond to the activities.

Table 13. Population abundance estimates, total proposed Level B take (when combining takes from drillship operations, ice management/icebreaking, and ZVSP surveys) for the Kulluk and Discoverer, and percentage of population that may be taken for the potentially affected species, dependent upon which drillship is used.

Species	Abundance[1]	Total Proposed Level B Take with the Kulluk[2]	Percentage of Stock or Population	Total Proposed Level B Take with the Discoverer[3]	Percentage of Stock or Population
Bowhead Whale	15,232[4]	5,608	36.8	1,398	9.2
Gray Whale	18,017	15	0.08	15	0.08
Beluga Whale	39,258	38	0.1	37	0.1
Harbor Porpoise	48,215	15	0.03	15	0.03
Ringed Seal	249,000	1,069	0.4	320	0.1
Bearded Seal	250,000	55	0.02	17	0.01
Spotted Seal	59,214	7	0.01	7	0.01
Ribbon Seal	49,000	5	0.01	5	0.01

[1]Abundance estimates taken from Allen and Angliss (2011) unless otherwise stated.
[2]This includes take from operation of the Kulluk, ice management/icebreaking, and the airguns.
[3]This includes take from operation of the Discoverer, ice management/icebreaking, and the airguns.
[4]Estimate from George et al. (2004) with an annual growth rate of 3.4%.

Negligible Impact Analysis

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

No injuries or mortalities are anticipated to occur as a result of Shell's proposed Camden Bay exploratory drilling program, and none are proposed to be authorized. Injury, serious injury, or mortality could occur if there were a large or very large oil spill. However, as discussed previously in this document, the likelihood of a spill is extremely remote. Shell has implemented many design and operational standards to mitigate the potential for an oil spill of any size. NMFS does not propose to authorize take from an oil spill, as it is not part of the specified activity. Additionally, animals in the area are not expected to incur hearing impairment (*i.e.,* TTS or PTS) or non-auditory physiological effects. Instead, any impact that could result from Shell's activities is most likely to be behavioral harassment and is expected to be of limited duration. Although it is possible that some individuals may be exposed to sounds from drilling operations more than once, during the migratory periods it is less likely that this will occur since animals will continue to move westward across the Beaufort Sea. This is especially true for bowhead whales that will be migrating past the drilling operations beginning in mid- to late September (depending on the date Shell resumes activities after the shutdown period for the fall bowhead subsistence hunts by the villages of Kaktovik and Nuiqsut).

Some studies have shown that bowhead whales will continue to feed in areas of seismic operations (*e.g.,* Richardson, 2004). Therefore, it is possible that some bowheads may continue to feed in an area of active drilling operations. It is important to note that the sounds produced by drilling operations are of a much lower intensity than those produced by seismic airguns. Should bowheads choose to feed in the ensonified area instead of avoiding the sound, individuals may be exposed to sounds at or above 120 dB (rms) for several hours to days, depending on how long the individual animal chooses to remain in the area to feed. Should bowheads choose to feed in Camden Bay during the ZVSP surveys, this activity will occur only twice during the entire drilling season and will not last more than 10–14 hours each time. It is anticipated that one such survey would occur prior to the migration period and one during the migration period. Therefore, feeding or migrating bowhead whales would only be exposed to airgun sounds for a total of 10–14 hours throughout the entire open-water season. As noted previously, many animals perform vital functions, such as feeding, resting, traveling, and socializing on a diel cycle (24-hr cycle). As discussed here, some bowhead whales may decide to remain in Camden Bay for several days to feed; however, they are not expected to be feeding for 24 hours straight each day. While feeding in an area of increased anthropogenic sound may potentially result in increased stress, it is not anticipated that the level of sound produced by the exploratory drilling operations and the amount of time that an individual whale may remain in the area to feed would result in noise-induced physiological stress to the animal. Additionally, if an animal is excluded from Camden Bay for feeding because it decides to avoid the ensonified area, this may result in some extra energy expenditure for the animal to find an alternate feeding ground. However, Camden Bay is only one of a few feeding areas for bowhead whales in the U.S. Arctic Ocean. NMFS anticipates that bowhead whales could find feeding opportunities in other parts of the Beaufort Sea.

Some bowhead whales have been observed feeding in the Camden Bay area in recent years, even though oil and gas activities have been occurring in the general region. There has also been recent evidence that some bowhead whales continued feeding in close proximity to seismic sources (*e.g.,* Richardson, 2004). The sounds produced by the drillship are of lower intensity than those produced by seismic airguns. Therefore, if animals remain in ensonified areas to feed, they would be in areas where the sound levels are not high enough to cause injury (based on the fact that source levels are not expected to reach levels known to cause even slight, mild TTS,

a non-injurious threshold shift). Additionally, if bowhead whales come within the 180–dB (rms) radius when the airguns are operational, Shell will shutdown the airguns until the animals are outside of the required EZ. Although the impact resulting from the generation of sound may cause a disruption in feeding activities in and around Camden Bay, this disruption is not reasonably likely to adversely affect bowhead whales.

Shell's proposed exploration drilling program is not expected to negatively affect the bowhead whale westward migration through the U.S. Beaufort Sea. The migration typically starts around the last week of August or first week of September. Shell has agreed to cease operations on August 25 for the fall bowhead whale hunts at Kaktovik and Cross Island (for the village of Nuiqsut). Operations will not resume until both communities have announced the close of the fall hunt, which typically occurs around September 15 each year. Therefore, whales that migrate through the area the first few weeks of the migration period will not be exposed to any acoustic or non-acoustic stimuli from Shell's proposed operations. Only the last 6 weeks of Shell's operations would occur during the migratory period. Cow/calf pairs typically migrate through the area later in the season (*i.e.,* late September/October) as opposed to the beginning of the season (*i.e.,* late August/early September). Shell's activities are not anticipated to have a negative effect on the migration or on the cow/calf pairs migrating through the area. If cow/calf pairs migrate through during airgun operations, power down and shutdown procedures are proposed to be required to reduce impacts further.

Beluga whales are more likely to occur in the project area after the recommencement of activities in September than in July or August. Should any belugas occur in the area of active drilling, it is not expected that they would remain in the area for a prolonged period of time, as their westward migration usually occurs further offshore (more than 37 mi [60 km]) and in deeper waters (more than 656 ft [200 m]) than that planned for the location of Shell's Camden Bay well sites. Gray whales do not occur frequently in the Camden Bay area of the Beaufort Sea. Additionally, there are no known feeding grounds for gray whales in the Camden Bay area. The most northern feeding sites known for this species are located in the Chukchi Sea near Hanna Shoal and Point Barrow. Based on these factors, exposures of gray whales to industrial sound are not expected to last for prolonged periods (*i.e.,* several days or weeks) since they are not known to remain in the area for extended periods of time. Since harbor porpoise are considered extralimital in the area with recent sightings not occurring east of Prudhoe Bay, no adverse impacts that could affect important life functions are anticipated for this species.

Some individual pinnipeds may be exposed to drilling sounds more than once during the timeframe of the project. This may be especially true for ringed seals, which occur in the Beaufort Sea year-round and are the most frequently encountered pinniped species in the area. However, as stated previously in this document, pinnipeds appear to be more tolerant of anthropogenic sound, especially at lower received levels, than other marine mammals, such as mysticetes.

Ringed seals construct lairs for pupping in the Beaufort Sea. However, this species typically does not construct lairs until late winter/early spring on the landfast ice. Because Shell will cease operations by October 31, they will not be in the area during the ringed seal pupping season. Bearded seals breed in the Bering and Chukchi Seas, as the Beaufort Sea provides less suitable habitat for the species. Spotted and ribbon seals are even less common in the Camden Bay area. These species do not breed in the Beaufort Sea. Shell's proposed exploration drilling program is not anticipated to impact breeding or pupping for any of the ice seal species.

Of the eight marine mammal species likely to occur in the proposed drilling area, only the bowhead whale is listed as endangered under the ESA. The species is also designated as ''depleted'' under the MMPA. Despite these designations, the Bering-Chukchi-Beaufort stock of bowheads has been increasing at a rate of 3.4% annually for nearly a decade (Allen and Angliss, 2011), even in the face of ongoing industrial activity. Additionally, during the 2001 census, 121 calves were counted, which was the highest yet recorded. The calf count provides corroborating evidence for a healthy and increasing population (Allen and Angliss, 2011). Certain stocks or populations of gray and beluga whales and spotted seals are listed as endangered or are proposed for listing under the ESA; however, none of those stocks or populations occur in the proposed activity area. On December 10, 2010, NMFS published a notice of proposed threatened status for subspecies of the ringed seal (75 FR 77476) and a notice of proposed threatened and not warranted status for subspecies and distinct population segments of the bearded seal (75 FR 77496) in the **Federal Register**. Neither of these two ice seal species is currently considered depleted under the MMPA. There is currently no established critical habitat in the proposed project area for any of these eight species.

Potential impacts to marine mammal habitat were discussed previously in this document (see the ''Anticipated Effects on Habitat'' section). Although some disturbance is possible to food sources of marine mammals, any impacts to affected marine mammal stocks or species are anticipated to be minor. Based on the vast size of the Arctic Ocean where feeding by marine mammals occurs versus the localized area of the drilling program, any missed feeding opportunities in the direct project area would be of little consequence, as marine mammals would have access to other feeding grounds.

If the *Kulluk* is the drillship used, the estimated takes proposed to be authorized represent 0.1% of the Beaufort Sea population of approximately 39,258 beluga whales (Allen and Angliss, 2011), 0.08% of the Eastern North Pacific stock of approximately 18,017 gray whales (Allen and Angliss, 2011), 0.03% of the Bering Sea stock of approximately 48,215 harbor porpoise (Allen and Angliss, 2011), and 36.8% of the Bering-Chukchi-Beaufort population of 15,232 individuals assuming 3.4% annual population growth from the 2001 estimate of 10,545 animals (Zeh and Punt, 2005). The take estimates presented for bearded, ringed, and spotted seals represent 0.02%, 0.4%, and 0.01% of the Bering-Chukchi-Beaufort populations for each species, respectively. The take estimate for ribbon seals represents 0.01% of the Alaska stock of this species. If the *Discoverer* is the drillship used, the estimated takes proposed to be authorized represent 0.1% of the Beaufort Sea population of approximately 39,258 beluga whales (Allen and Angliss, 2011), 0.08% of the Eastern North Pacific stock of approximately 18,017 gray whales (Allen and Angliss, 2011), 0.03% of the Bering Sea stock of approximately 48,215 harbor porpoise (Allen and Angliss, 2011), and 9.2% of the Bering-Chukchi-Beaufort population of 15,232 individuals assuming 3.4% annual population growth from the 2001 estimate of 10,545 animals (Zeh and Punt, 2005). The take estimates presented for bearded, ringed, and spotted seals represent 0.01%, 0.1%, and 0.01% of the Bering-Chukchi-Beaufort populations for each species,

respectively. The take estimate for ribbon seals represents 0.01% of the Alaska stock of this species. These estimates represent the percentage of each species or stock that could be taken by Level B behavioral harassment if each animal is taken only once.

The estimated take numbers are likely somewhat of an overestimate for several reasons. First, these take numbers were calculated using a 50% inflation factor of the 120-dB and 160-dB radii, which is a conservative approach recommended by some acousticians when modeling a new sound source in a new location. SSV tests could reveal that the Level B harassment zone is either smaller or larger than that used to estimate take. If the SSV tests reveal that the Level B harassment zones are slightly larger than those modeled, the 50% inflation factor should cover the discrepancy, however, based on recent SSV tests of seismic airguns (which showed that the measured 160-dB isopleths was in the area of the modeled value), the 50% correction factor likely results in an overestimate of takes. Additionally, the mitigation and monitoring measures (described previously in this document) proposed for inclusion in the IHA (if issued) are expected to reduce even further any potential disturbance to marine mammals. Last, some marine mammal individuals, including mysticetes, have been shown to avoid the ensonified area around airguns at certain distances (Richardson *et al.,* 1999), and, therefore, some individuals would not likely enter into the Level B harassment zones for the various types of activities.

The take estimates for the *Kulluk* are approximately four times those for the *Discoverer.* One explanation for this is that the *Kulluk's* original rigid structure does little to dampen vibration as it moves through the structure to the hull. The *Kulluk's* main engines are welded to the deck rather than being on vibration absorbing mounts, which may also contribute to the relatively higher sound level. This past year, Shell has invested in retrofitting the *Kulluk.* This retrofit includes changing out the engines and installing sound dampening mounts for the new engines. This retrofit is expected to help lower the sound levels emitted by the *Kulluk.* As stated previously, Shell intends to conduct SSV tests for all vessels, including the drillship, once on location in the Beaufort Sea in 2012. Therefore, there is the potential for the take estimates to be reduced even further.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

Relevant Subsistence Uses

The disturbance and potential displacement of marine mammals by sounds from drilling activities are the principal concerns related to subsistence use of the area. Subsistence remains the basis for Alaska Native culture and community. Marine mammals are legally hunted in Alaskan waters by coastal Alaska Natives. In rural Alaska, subsistence activities are often central to many aspects of human existence, including patterns of family life, artistic expression, and community religious and celebratory activities. Additionally, the animals taken for subsistence provide a significant portion of the food that will last the community throughout the year. The main species that are hunted include bowhead and beluga whales, ringed, spotted, and bearded seals, walruses, and polar bears. (As mentioned previously in this document, both the walrus and the polar bear are under the USFWS' jurisdiction.) The importance of each of these species varies among the communities and is largely based on availability.

The subsistence communities in the Beaufort Sea that have the potential to be impacted by Shell's Camden Bay drilling program include Kaktovik, Nuiqsut, and Barrow. Kaktovik is a coastal community 60 mi (96.6 km) east of the project area. Nuiqsut is 118 mi (190 km) west of the project area and about 20 mi (32 km) inland from the coast along the Colville River. Cross Island, from which Nuiqsut hunters base their bowhead whaling activities, is 47 mi (75.6 km) southwest of the project area. Barrow, the community farthest from the project area, lies 298 mi (479.6 km) west of Shell's Camden Bay drill sites.

(1) Bowhead Whales

Of the three communities, Barrow is the only one that currently participates in a spring bowhead whale hunt. However, this hunt is not anticipated to be affected by Shell's activities, as the spring hunt occurs in late April to early May, and Shell's Camden Bay drilling program will not begin until July 10, at the earliest.

All three communities participate in a fall bowhead hunt. In autumn, westward-migrating bowhead whales typically reach the Kaktovik and Cross Island (Nuiqsut hunters) areas by early September, at which points the hunts begin (Kaleak, 1996; Long, 1996; Galginaitis and Koski, 2002; Galginaitis and Funk, 2004, 2005; Koski *et al.,* 2005). Around late August, the hunters from Nuiqsut establish camps on Cross Island from where they undertake the fall bowhead whale hunt. The hunting period starts normally in early September and may last as late as mid-October, depending mainly on ice and weather conditions and the success of the hunt. Most of the hunt occurs offshore in waters east, north, and northwest of Cross Island where bowheads migrate and not inside the barrier islands (Galginaitis, 2007). Hunters prefer to take bowheads close to shore to avoid a long tow, but Braund and Moorehead (1995) report that crews may (rarely) pursue whales as far as 50 mi (80 km) offshore. Whaling crews use Kaktovik as their home base, leaving the village and returning on a daily basis. The core whaling area is within 12 mi (19.3 km) of the village with a periphery ranging about 8 mi (13 km) farther, if necessary. The extreme limits of the Kaktovik whaling limit would be the middle of Camden Bay to the west. The timing of the Kaktovik bowhead whale hunt roughly parallels the Cross Island whale hunt (Impact Assessment Inc, 1990b; SRB&A, 2009:Map 64). In recent years, the hunts at Kaktovik and Cross Island have usually ended by mid- to late September.

Westbound bowheads typically reach the Barrow area in mid-September and are in that area until late October (Brower, 1996). However, over the years, local residents report having seen a small number of bowhead whales feeding off Barrow or in the pack ice off Barrow during the summer. Recently, autumn bowhead whaling near Barrow has normally begun in mid-September to early October, but in earlier years it began as early as August if whales were observed and ice conditions were favorable (USDI/BLM, 2005). The recent decision to delay harvesting whales until mid-to-late September has been made to prevent spoilage, which might occur if whales were harvested earlier in the season when the temperatures tend to be warmer. Whaling near Barrow can continue into October, depending on the quota and conditions.

Shell anticipates arriving on location in Camden Bay around July 10 and continuing operations until August 25. Shell has stated that it will suspend all operations on August 25 for the Nuiqsut (Cross Island) and Kaktovik subsistence bowhead whale hunts. The drillship and support vessels will leave the Camden Bay project area, will move to a location at or north of 71.25° N. latitude and at or west of 146.4° W. longitude, and will return to resume activities after the Nuiqsut (Cross

Island) and Kaktovik bowhead hunts conclude. Depending on when Nuiqsut and Kaktovik declare their hunts closed, drilling operations may resume in the middle of the Barrow fall bowhead hunt.

(2) Beluga Whales

Beluga whales are not a prevailing subsistence resource in the communities of Kaktovik and Nuiqsut. Kaktovik hunters may harvest one beluga whale in conjunction with the bowhead hunt; however, it appears that most households obtain beluga through exchanges with other communities. Although Nuiqsut hunters have not hunted belugas for many years while on Cross Island for the fall hunt, this does not mean that they may not return to this practice in the future. Data presented by Braund and Kruse (2009) indicate that only 1% of Barrow's total harvest between 1962 and 1982 was of beluga whales and that it did not account for any of the harvested animals between 1987 and 1989.

There has been minimal harvest of beluga whales in Beaufort Sea villages in recent years. Additionally, if belugas are harvested, it is usually in conjunction with the fall bowhead harvest. Shell will not be operating during the Kaktovik and Nuiqsut fall bowhead harvests.

(3) Ice Seals

Ringed seals are available to subsistence users in the Beaufort Sea year-round, but they are primarily hunted in the winter or spring due to the rich availability of other mammals in the summer. Bearded seals are primarily hunted during July in the Beaufort Sea; however, in 2007, bearded seals were harvested in the months of August and September at the mouth of the Colville River Delta. An annual bearded seal harvest occurs in the vicinity of Thetis Island (which is a considerable distance from Shell's proposed Camden Bay drill sites) in July through August. Approximately 20 bearded seals are harvested annually through this hunt. Spotted seals are harvested by some of the villages in the summer months. Nuiqsut hunters typically hunt spotted seals in the nearshore waters off the Colville River delta, which is more than 100 mi (161 km) from Shell's proposed drill sites.

Although there is the potential for some of the Beaufort villages to hunt ice seals during the summer and fall months while Shell is conducting exploratory drilling operations, the primary sealing months occur outside of Shell's operating time frame. Additionally, some of the more established seal hunts that do occur in the Beaufort Sea, such as the Colville delta area hunts, are located a significant distance (in some instances 100 mi [161 km] or more) from the proposed project area.

Potential Impacts to Subsistence Uses

NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by causing the marine mammals to abandon or avoid hunting areas; directly displacing subsistence users; or placing physical barriers between the marine mammals and the subsistence hunters; and that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Noise and general activity during Shell's proposed drilling program have the potential to impact marine mammals hunted by Native Alaskans. In the case of cetaceans, the most common reaction to anthropogenic sounds (as noted previously in this document) is avoidance of the ensonified area. In the case of bowhead whales, this often means that the animals divert from their normal migratory path by several kilometers. Helicopter activity also has the potential to disturb cetaceans and pinnipeds by causing them to vacate the area. Additionally, general vessel presence in the vicinity of traditional hunting areas could negatively impact a hunt. Native knowledge indicates that bowhead whales become increasingly ''skittish'' in the presence of seismic noise. Whales are more wary around the hunters and tend to expose a much smaller portion of their back when surfacing (which makes harvesting more difficult). Additionally, natives report that bowheads exhibit angry behaviors in the presence of seismic, such as tail-slapping, which translate to danger for nearby subsistence harvesters.

In the case of subsistence hunts for bowhead whales in the Beaufort Sea, there could be an adverse impact on the hunt if the whales were deflected seaward (further from shore) in traditional hunting areas. The impact would be that whaling crews would have to travel greater distances to intercept westward migrating whales, thereby creating a safety hazard for whaling crews and/or limiting chances of successfully striking and landing bowheads.

Plan of Cooperation (POC)

Regulations at 50 CFR 216.104(a)(12) require IHA applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. Shell has developed a Draft POC for its 2012 Camden Bay, Beaufort Sea, Alaska, exploration drilling program to minimize any adverse impacts on the availability of marine mammals for subsistence uses. A copy of the Draft POC was provided to NMFS with the IHA Application as Attachment D (see **ADDRESSES** for availability). Meetings with potentially affected subsistence users began in 2009 and continued into 2010 and 2011 (see Table 4.2–1 in Shell's POC for a list of all meetings conducted through April 2011). During these meetings, Shell focused on lessons learned from prior years' activities and presented mitigation measures for avoiding potential conflicts, which are outlined in the 2012 POC and this document. For the 2012 Camden Bay drilling program, Shell's POC with Chukchi Sea villages primarily addresses the issue of transit of vessels, whereas the POC with Beaufort Sea villages addresses vessel transit, drilling, and associated activities. Communities that were consulted regarding Shell's 2012 Arctic Ocean operations include: Barrow, Kaktovik, Wainwright, Kotzebue, Kivalina, Point Lay, Point Hope, Kiana, Gambell, Savoonga, and Shishmaref.

Beginning in early January 2009 and continuing into 2011, Shell held one-on-one meetings with representatives from the North Slope Borough (NSB) and Northwest Arctic Borough (NWAB), subsistence-user group leadership, and Village Whaling Captain Association representatives. Shell's primary purpose in holding individual meetings was to inform and prepare key leaders, prior to the public meetings, so that they would be prepared to give appropriate feedback on planned activities.

Shell presented the proposed project to the NWAB Assembly on January 27, 2009, to the NSB Assembly on February 2, 2009, and to the NSB and NWAB Planning Commissions in a joint meeting on March 25, 2009. Meetings were also scheduled with representatives from the Alaska Eskimo Whaling Commission (AEWC), and presentations on proposed activities were given to the Inupiat Community of the Arctic Slope, and the Native Village of Barrow. On December 8, 2009, Shell held consultation meetings with

representatives from the various marine mammal commissions. Prior to drilling in 2012, Shell will also hold additional consultation meetings with the affected communities and subsistence user groups, NSB, and NWAB to discuss the mitigation measures included in the POC. Shell also attended the 2011 Conflict Avoidance Agreement (CAA) negotiation meetings in support of a limited program of marine environmental baseline activities in 2011 taking place in the Beaufort and Chukchi seas. Shell has stated that it is committed to a CAA process and will demonstrate this by making a good-faith effort to negotiate a CAA every year it has planned activities.

The following mitigation measures, plans and programs, are integral to the POC and were developed during consultation with potentially affected subsistence groups and communities. These measures, plans, and programs will be implemented by Shell during its 2012 exploration drilling operations in both the Beaufort and Chukchi Seas to monitor and mitigate potential impacts to subsistence users and resources. The mitigation measures Shell has adopted and will implement during its 2012 Camden Bay exploration drilling operations are listed and discussed below. The most recent version of Shell's planned mitigation measures was presented to community leaders and subsistence user groups starting in January of 2009 and has evolved since in response to information learned during the consultation process.

To minimize any cultural or resource impacts to subsistence whaling activities from its exploration operations, Shell will suspend drilling activities on August 25, 2012, prior to the start of the Kaktovik and Cross Island bowhead whale hunting season. The drillship and associated vessels will remain outside of the Camden Bay area during the hunt. Shell will resume drilling operations after the conclusion of the hunt and, depending on ice and weather conditions, continue its exploration activities through October 31, 2012. In addition to the adoption of this project timing restriction, Shell will implement the following additional measures to ensure coordination of its activities with local subsistence users to minimize further the risk of impacting marine mammals and interfering with the subsistence hunts for marine mammals:

(1) The drillship and support vessels will transit through the Chukchi Sea along a route that lies offshore of the polynya zone. In the event the transit outside of the polynya zone results in Shell having to break ice (as opposed to managing ice by pushing it out of the way), the drillship and support vessels will enter into the polynya zone far enough so that ice breaking is not necessary. If it is necessary to move into the polynya zone, Shell will notify the local communities of the change in the transit route through the Com Centers;

(2) Shell has developed a Communication Plan and will implement the plan before initiating exploration drilling operations to coordinate activities with local subsistence users as well as Village Whaling Associations in order to minimize the risk of interfering with subsistence hunting activities and keep current as to the timing and status of the bowhead whale migration, as well as the timing and status of other subsistence hunts. The Communication Plan includes procedures for coordination with Com and Call Centers to be located in coastal villages along the Chukchi and Beaufort Seas during Shell's proposed activities in 2012;

(3) Shell will employ local Subsistence Advisors from the Beaufort and Chukchi Sea villages to provide consultation and guidance regarding the whale migration and subsistence hunt. There will be a total of nine subsistence advisor-liaison positions (one per village), to work approximately 8-hours per day and 40-hour weeks through Shell's 2012 exploration project. The subsistence advisor will use local knowledge (Traditional Knowledge) to gather data on subsistence lifestyle within the community and advise on ways to minimize and mitigate potential impacts to subsistence resources during the drilling season. Responsibilities include reporting any subsistence concerns or conflicts; coordinating with subsistence users; reporting subsistence-related comments, concerns, and information; and advising how to avoid subsistence conflicts. A subsistence advisor handbook will be developed prior to the operational season to specify position work tasks in more detail;

(4) Shell will implement flight restrictions prohibiting aircraft from flying within 1,000 ft (305 m) of marine mammals or below 1,500 ft (457 m) altitude (except during takeoffs and landings or in emergency situations) while over land or sea;

(5) The drilling support fleet will avoid known fragile ecosystems, including the Ledyard Bay Critical Habitat Unit and will include coordination through the Com Centers;

(6) All vessels will maintain cruising speed not to exceed 9 knots while transiting the Beaufort Sea;

(7) Collect all drilling mud and cuttings with adhered mud from all well sections below the 26-inch (20-inch casing) section, as well as treated sanitary waste water, domestic wastes, bilge water, and ballast water and transport them outside the Arctic for proper disposal in an Environmental Protection Agency licensed treatment/disposal site. These waste streams shall not be discharged into the ocean;

(8) Drilling mud shall be cooled to mitigate any potential permafrost thawing or thermal dissociation of any methane hydrates encountered during exploration drilling if such materials are present at the drill site; and

(9) Drilling mud shall be recycled to the extent practicable based on operational considerations (*e.g.,* whether mud properties have deteriorated to the point where they cannot be used further) so that the volume of the mud disposed of at the end of the drilling season is reduced.

The POC also contains measures regarding ice management procedures, critical operations procedures, the blowout prevention program, and oil spill response. Some of the oil spill response measures to reduce impacts to subsistence hunts include: Having the primary OSRV on standby at all times so that it is available within 1 hour if needed; the remainder of the OSR fleet will be available within 72 hours if needed and will be capable of collecting oil on the water up to the calculated Worst Case Discharge; oil spill containment equipment will be available in the unlikely event of a blowout; capping stack equipment will be stored aboard one of the ice management vessels and will be available for immediate deployment in the unlikely event of a blowout; and pre-booming will be required for all fuel transfers between vessels.

Unmitigable Adverse Impact Analysis

Shell has adopted a spatial and temporal strategy for its Camden Bay operations that should minimize impacts to subsistence hunters. First, Shell's activities will not commence until after the spring hunts have occurred. Additionally, Shell will traverse the Chukchi Sea far offshore, so as to not interfere with July hunts in the Chukchi Sea and will communicate with the Com Centers to notify local communities of any changes in the transit route. Once Shell is on location in Camden Bay, Beaufort Sea, whaling will not commence until late August/early September. Shell has agreed to cease operations on August 25 to allow the villages of Kaktovik and Nuiqsut to prepare for the fall bowhead hunts, will

move the drillship and all support vessels out of the hunting area so that there are no physical barriers between the marine mammals and the hunters, and will not recommence activities until the close of both villages' hunts.

Kaktovik is located 60 mi (96.6 km) east of the project area. Therefore, westward migrating whales would reach Kaktovik before reaching the area of Shell's activities or any of the ensonified zones. Although Cross Island and Barrow are west of Shell's drill sites, sound generating activities from Shell's drilling program will have ceased prior to the whales passing through the area. Additionally, Barrow lies 298 mi (479.6 km) west of Shell's Camden Bay drill sites, so whalers in that area would not be displaced by any of Shell's activities.

Adverse impacts are not anticipated on sealing activities since the majority of hunts for seals occur in the winter and spring, when Shell will not be operating. Sealing activities in the Colville River delta area occur more than 100 mi (161 km) from Shell's Camden Bay drill sites.

Shell will also support the village Com Centers in the Arctic communities and employ local SAs from the Beaufort and Chukchi Sea villages to provide consultation and guidance regarding the whale migration and subsistence hunt. The SAs will provide advice to Shell on ways to minimize and mitigate potential impacts to subsistence resources during the drilling season.

In the unlikely event of a major oil spill in the Beaufort Sea, there could be major impacts on the availability of marine mammals for subsistence uses. As discussed earlier in this document, the probability of a major oil spill occurring over the life of the project is low (Bercha, 2008). Additionally, Shell developed an ODPCP, which is currently under review by the Department of the Interior and several Federal agencies and the public. Shell has also incorporated several mitigation measures into its operational design to reduce further the risk of an oil spill. Copies of Shell's 2012 Camden Bay Exploration Plan and ODPCP can be found on the Internet at: *http://www.alaska.boemre.gov/ref/ProjectHistory/2012Shell_BF/revisedEP/EP.pdf* and *http://www.alaska.boemre.gov/fo/ODPCPs/2010_BF_rev1.pdf,* respectively.

Proposed Incidental Harassment Authorization

This section contains a draft of the IHA itself. The wording contained in this section is proposed for inclusion in the IHA (if issued).

(1) This Authorization is valid from July 10, 2012, through October 31, 2012.

(2) This Authorization is valid only for activities associated with Shell's 2012 Camden Bay exploration drilling program. The specific areas where Shell's exploration drilling program will be conducted are within Shell lease holdings in the Outer Continental Shelf Lease Sale 195 and 202 areas in the Beaufort Sea.

(3)(a) The incidental taking of marine mammals, by Level B harassment only, is limited to the following species: Bowhead whale; gray whale; beluga whale; harbor porpoise; ringed seal; bearded seal; spotted seal; and ribbon seal.

(3)(b) The taking by injury (Level A harassment), serious injury, or death of any of the species listed in Condition 3(a) or the taking of any kind of any other species of marine mammal is prohibited and may result in the modification, suspension or revocation of this Authorization.

(4) The authorization for taking by harassment is limited to the following acoustic sources (or sources with comparable frequency and intensity) and from the following activities:

(a) 8-airgun array with a total discharge volume of 760 in^3;

(b) continuous drillship sounds during active drilling operations; and

(c) vessel sounds generated during active ice management or icebreaking.

(5) The taking of any marine mammal in a manner prohibited under this Authorization must be reported immediately to the Chief, Permits and Conservation Division, Office of Protected Resources, NMFS or his designee.

(6) The holder of this Authorization must notify the Chief of the Permits and Conservation Division, Office of Protected Resources, at least 48 hours prior to the start of exploration drilling activities (unless constrained by the date of issuance of this Authorization in which case notification shall be made as soon as possible).

(7) General Mitigation and Monitoring Requirements: The Holder of this Authorization is required to implement the following mitigation and monitoring requirements when conducting the specified activities to achieve the least practicable impact on affected marine mammal species or stocks:

(a) All vessels shall reduce speed to at least 9 knots when within 300 yards (274 m) of whales. The reduction in speed will vary based on the situation but must be sufficient to avoid interfering with the whales. Those vessels capable of steering around such groups should do so. Vessels may not be operated in such a way as to separate members of a group of whales from other members of the group;

(b) Avoid multiple changes in direction and speed when within 300 yards (274 m) of whales;

(c) When weather conditions require, such as when visibility drops, support vessels must reduce speed and change direction, as necessary (and as operationally practicable), to avoid the likelihood of injury to whales;

(d) All vessels shall maintain cruising speed not to exceed 9 knots while transiting the Beaufort Sea in order to reduce the risk of ship-whale collisions;

(e) Aircraft shall not fly within 1,000 ft (305 m) of marine mammals or below 1,500 ft (457 m) altitude (except during takeoffs, landings, or in emergency situations) while over land or sea;

(f) Utilize two, NMFS-qualified, vessel-based Protected Species Observers (PSOs) (except during meal times and restroom breaks, when at least one PSO shall be on watch) to visually watch for and monitor marine mammals near the drillship or support vessel during active drilling or airgun operations (from nautical twilight-dawn to nautical twilight-dusk) and before and during start-ups of airguns day or night. The vessels' crew shall also assist in detecting marine mammals, when practicable. PSOs shall have access to reticle binoculars (7x50 Fujinon), big-eye binoculars (25x150), and night vision devices. PSO shifts shall last no longer than 4 hours at a time and shall not be on watch more than 12 hours in a 24-hour period. PSOs shall also make observations during daytime periods when active operations are not being conducted for comparison of animal abundance and behavior, when feasible;

(g) When a mammal sighting is made, the following information about the sighting will be recorded:

(i) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from the MMO, apparent reaction to activities (*e.g.,* none, avoidance, approach, paralleling, *etc.*), closest point of approach, and behavioral pace;

(ii) Time, location, speed, activity of the vessel, sea state, ice cover, visibility, and sun glare; and

(iii) The positions of other vessel(s) in the vicinity of the MMO location.

(iv) The ship's position, speed of support vessels, and water temperature, water depth, sea state, ice cover, visibility, and sun glare will also be recorded at the start and end of each observation watch, every 30 minutes

during a watch, and whenever there is a change in any of those variables.

(h) PSO teams shall consist of Inupiat observers and experienced field biologists. An experienced field crew leader will supervise the PSO team onboard the survey vessel. New observers shall be paired with experienced observers to avoid situations where lack of experience impairs the quality of observations;

(i) PSOs will complete a two- or three-day training session on marine mammal monitoring, to be conducted shortly before the anticipated start of the 2012 open-water season. The training session(s) will be conducted by qualified marine mammalogists with extensive crew-leader experience during previous vessel-based monitoring programs. A marine mammal observers' handbook, adapted for the specifics of the planned program will be reviewed as part of the training;

(j) If there are Alaska Native PSOs, the PSO training that is conducted prior to the start of the survey activities shall be conducted with both Alaska Native PSOs and biologist PSOs being trained at the same time in the same room. There shall not be separate training courses for the different PSOs; and

(k) PSOs shall be trained using visual aids (*e.g.,* videos, photos), to help them identify the species that they are likely to encounter in the conditions under which the animals will likely be seen.

(8) ZVSP Mitigation and Monitoring Measures: The Holder of this Authorization is required to implement the following mitigation and monitoring requirements when conducting the specified activities to achieve the least practicable impact on affected marine mammal species or stocks:

(a) PSOs shall conduct monitoring while the airgun array is being deployed or recovered from the water;

(b) PSOs shall visually observe the entire extent of the exclusion zone (EZ) (180 dB re 1 μPa [rms] for cetaceans and 190 dB re 1 μPa [rms] for pinnipeds) using NMFS-qualified PSOs, for at least 30 minutes (min) prior to starting the airgun array (day or night). If the PSO finds a marine mammal within the EZ, Shell must delay the seismic survey until the marine mammal(s) has left the area. If the PSO sees a marine mammal that surfaces then dives below the surface, the PSO shall continue the watch for 30 min. If the PSO sees no marine mammals during that time, they should assume that the animal has moved beyond the EZ. If for any reason the entire radius cannot be seen for the entire 30 min period (*i.e.,* rough seas, fog, darkness), or if marine mammals are near, approaching, or in the EZ, the airguns may not be ramped-up. If one airgun is already running at a source level of at least 180 dB re 1 μPa (rms), the Holder of this Authorization may start the second airgun without observing the entire EZ for 30 min prior, provided no marine mammals are known to be near the EZ;

(c) Establish and monitor a 180 dB re 1 μPa (rms) and a 190 dB re 1 μPa (rms) EZ for marine mammals before the 8-airgun array (760 in^3) is in operation; and a 180 dB re 1 μPa (rms) and a 190 dB re 1 μPa (rms) EZ before a single airgun (40 in^3) is in operation, respectively. For purposes of the field verification tests, described in condition 10(c)(i) below, the 180 dB radius is predicted to be 0.77 mi (1.24 km) and the 190 dB radius is predicted to be 0.33 mi (524 m);

(d) Implement a ''ramp-up'' procedure when starting up at the beginning of seismic operations, which means start the smallest gun first and add airguns in a sequence such that the source level of the array shall increase in steps not exceeding approximately 6 dB per 5-min period. During ramp-up, the PSOs shall monitor the EZ, and if marine mammals are sighted, a power-down, or shut-down shall be implemented as though the full array were operational. Therefore, initiation of ramp-up procedures from shut-down requires that the PSOs be able to view the full EZ;

(e) Power-down or shutdown the airgun(s) if a marine mammal is detected within, approaches, or enters the relevant EZ. A shutdown means all operating airguns are shutdown (*i.e.,* turned off). A power-down means reducing the number of operating airguns to a single operating 40 in^3 airgun, which reduces the EZ to the degree that the animal(s) is no longer in or about to enter it;

(f) Following a power-down, if the marine mammal approaches the smaller designated EZ, the airguns must then be completely shutdown. Airgun activity shall not resume until the PSO has visually observed the marine mammal(s) exiting the EZ and is not likely to return, or has not been seen within the EZ for 15 min for species with shorter dive durations (small odontocetes and pinnipeds) or 30 min for species with longer dive durations (mysticetes);

(g) Following a power-down or shut-down and subsequent animal departure, airgun operations may resume following ramp-up procedures described in Condition 8(d) above;

(h) ZVSP surveys may continue into night and low-light hours if such segment(s) of the survey is initiated when the entire relevant EZs are visible and can be effectively monitored; and

(i) No initiation of airgun array operations is permitted from a shutdown position at night or during low-light hours (such as in dense fog or heavy rain) when the entire relevant EZ cannot be effectively monitored by the PSO(s) on duty.

(9) Subsistence Mitigation Measures: To ensure no unmitigable adverse impact on subsistence uses of marine mammals, the Holder of this Authorization shall:

(a) Traverse north through the Bering Strait through the Chukchi Sea along a route that lies offshore of the polynya zone. In the event the transit outside of the polynya zone results in Shell having to break ice, the drilling vessel and support vessels will enter into the polynya zone far enough so that icebreaking is not necessary. If it is necessary to move into the polynya zone, Shell shall notify the local communities of the change in transit route through the Communication and Call Centers (Com Centers). As soon as the fleet transits past the ice, it will exit the polynya zone and continue a path in the open sea toward the Camden Bay drill sites;

(b) Implement the Communication Plan before initiating exploration drilling operations to coordinate activities with local subsistence users and Village Whaling Associations in order to minimize the risk of interfering with subsistence hunting activities;

(c) Participate in the Com Center Program. The Com Centers shall operate 24 hours/day during the 2012 bowhead whale hunt;

(d) Employ local Subsistence Advisors (SAs) from the Beaufort and Chukchi Sea villages to provide consultation and guidance regarding the whale migration and subsistence hunt;

(e) Not operate aircraft below 1,500 ft (457 m) unless engaged in marine mammal monitoring, approaching, landing or taking off, or unless engaged in providing assistance to a whaler or in poor weather (low ceilings) or any other emergency situations;

(f) Collect all drilling mud and cuttings with adhered mud from all well sections below the 26-inch (20-inch casing) section, as well as treated sanitary waste water, domestic wastes, bilge water, and ballast water and transport them outside the Arctic for proper disposal in an Environmental Protection Agency licensed treatment/disposal site. These waste streams shall not be discharged into the ocean;

(g) Cool all drilling mud to mitigate any potential permafrost thawing or thermal dissociation of any methane

hydrates encountered during exploration drilling if such materials are present at the drill site;

(h) Recycle all drilling mud to the extent practicable based on operational considerations (*e.g.,* whether mud properties have deteriorated to the point where they cannot be used further) so that the volume of the mud disposed of at the end of the drilling season is reduced; and

(i) Suspended all drilling activities on August 25 for the Kaktovik and Nuiqsut (Cross Island) fall bowhead whale hunts. The drilling vessel and support fleet shall leave the Camden Bay project area and move to an area north of latitude 71°25′ N and west of longitude 146°4′ W. Shell shall not return to the area to resume drilling operations until the close of the Kaktovik and Nuiqsut fall bowhead whale hunts.

(10) Monitoring Measures

(a) *Vessel-based Monitoring:* The Holder of this Authorization shall designate biologically-trained PSOs to be aboard the drillship and all support vessels. The PSOs are required to monitor for marine mammals in order to implement the mitigation measures described in conditions 7 and 8 above;

(b) *Aerial Survey Monitoring:* The Holder of this Authorization must implement the aerial survey monitoring program detailed in its Marine Mammal Mitigation and Monitoring Plan (4MP). The surveys must commence 5 to 7 days before operations at the exploration well sites get underway. Surveys shall be flown daily throughout operations, weather and flight conditions permitting and shall continue for 5 to 7 days after all activities at the site have ended; and

(c) Acoustic Monitoring:

(i) *Field Source Verification:* the Holder of this Authorization is required to conduct sound source verification tests for the drilling vessel, support vessels, and the airgun array. Sound source verification shall consist of distances where broadside and endfire directions at which broadband received levels reach 190, 180, 170, 160, and 120 dB re 1 μPa (rms) for all active acoustic sources that may be used during the activities. For the airgun array, the configurations shall include at least the full array and the operation of a single source that will be used during power downs. The test results shall be reported to NMFS within 5 days of completing the test.

(ii) *Acoustic Study of Bowhead Deflections:* Deploy acoustic recorders at five sites along the bowhead whale migration path in order to record vocalizations of bowhead whales as they pass through the exploration drilling area. This program must be implemented as detailed in the 4MP.

(11) *Reporting Requirements:* The Holder of this Authorization is required to:

(a) Within 5 days of completing the sound source verification tests for the drillship, support vessels, and the airguns, the Holder shall submit a preliminary report of the results to NMFS. The report should report down to the 120-dB radius in 10-dB increments;

(b) Submit a draft report on all activities and monitoring results to the Office of Protected Resources, NMFS, within 90 days of the completion of the exploration drilling program. This report must contain and summarize the following information:

(i) Summaries of monitoring effort (*e.g.,* total hours, total distances, and marine mammal distribution through the study period, accounting for sea state and other factors affecting visibility and detectability of marine mammals);

(ii) analyses of the effects of various factors influencing detectability of marine mammals (*e.g.,* sea state, number of observers, and fog/glare);

(iii) species composition, occurrence, and distribution of marine mammal sightings, including date, water depth, numbers, age/size/gender categories (if determinable), group sizes, and ice cover;

(iv) sighting rates of marine mammals during periods with and without exploration drilling activities (and other variables that could affect detectability), such as: (A) Initial sighting distances versus drilling state; (B) closest point of approach versus drilling state; (C) observed behaviors and types of movements versus drilling state; (D) numbers of sightings/individuals seen versus drilling state; (E) distribution around the survey vessel versus drilling state; and (F) estimates of take by harassment;

(v) Reported results from all hypothesis tests should include estimates of the associated statistical power when practicable;

(vi) Estimate and report uncertainty in all take estimates. Uncertainty could be expressed by the presentation of confidence limits, a minimum-maximum, posterior probability distribution, *etc.;* the exact approach would be selected based on the sampling method and data available;

(vii) The report should clearly compare authorized takes to the level of actual estimated takes.

(viii) If, after the independent monitoring plan peer review changes are made to the monitoring program, those changes must be detailed in the report.

(c) The draft report will be subject to review and comment by NMFS. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS. The draft report will be considered the final report for this activity under this Authorization if NMFS has not provided comments and recommendations within 90 days of receipt of the draft report.

(d) A draft comprehensive report describing the aerial, acoustic, and vessel-based monitoring programs will be prepared and submitted within 240 days of the date of this Authorization. The comprehensive report will describe the methods, results, conclusions and limitations of each of the individual data sets in detail. The report will also integrate (to the extent possible) the studies into a broad based assessment of all industry activities and their impacts on marine mammals in the Arctic Ocean during 2012.

(e) The draft comprehensive report will be subject to review and comment by NMFS, the AEWC, and the NSB Department of Wildlife Management. The draft comprehensive report will be accepted by NMFS as the final comprehensive report upon incorporation of comments and recommendations.

(12)(a) In the unanticipated event that the drilling program operation clearly causes the take of a marine mammal in a manner prohibited by this Authorization, such as an injury (Level A harassment), serious injury or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), Shell shall immediately cease operations and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, by phone or email and the Alaska Regional Stranding Coordinators. The report must include the following information: (i) Time, date, and location (latitude/longitude) of the incident; (ii) the name and type of vessel involved; (iii) the vessel's speed during and leading up to the incident; (iv) description of the incident; (v) status of all sound source use in the 24 hours preceding the incident; (vi) water depth; (vii) environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility); (viii) description of marine mammal observations in the 24 hours preceding the incident; (ix) species identification or description of the animal(s) involved; (x) the fate of the animal(s); (xi) and photographs or video footage of the animal (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with Shell to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. Shell may not resume their activities until notified by NMFS via letter, email, or telephone.

(b) In the event that Shell discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decomposition as described in the next paragraph), Shell will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, by phone or email and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinators. The report must include the same information identified in Condition 12(a) above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with Shell to determine whether modifications in the activities are appropriate.

(c) In the event that Shell discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in Condition 2 of this Authorization (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), Shell shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, by phone or email and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinators, within 24 hours of the discovery. Shell shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Activities may continue while NMFS reviews the circumstances of the incident.

(13) Activities related to the monitoring described in this Authorization do not require a separate scientific research permit issued under section 104 of the Marine Mammal Protection Act.

(14) The Plan of Cooperation outlining the steps that will be taken to cooperate and communicate with the native communities to ensure the availability of marine mammals for subsistence uses must be implemented.

(15) Shell is required to comply with the Terms and Conditions of the Incidental Take Statement (ITS) corresponding to NMFS's Biological Opinion issued to NMFS's Office of Protected Resources.

(16) A copy of this Authorization and the ITS must be in the possession of all contractors and PSOs operating under the authority of this Incidental Harassment Authorization.

(17) Penalties and Permit Sanctions: Any person who violates any provision of this Incidental Harassment Authorization is subject to civil and criminal penalties, permit sanctions, and forfeiture as authorized under the MMPA.

(18) This Authorization may be modified, suspended or withdrawn if the Holder fails to abide by the conditions prescribed herein or if the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals, or if there is an unmitigable adverse impact on the availability of such species or stocks for subsistence uses.

Endangered Species Act (ESA)

There is one marine mammal species listed as endangered under the ESA with confirmed or possible occurrence in the proposed project area: the bowhead whale. NMFS' Permits and Conservation Division will initiate consultation with NMFS' Endangered Species Division under section 7 of the ESA on the issuance of an IHA to Shell under section 101(a)(5)(D) of the MMPA for this activity. Consultation will be concluded prior to a determination on the issuance of an IHA.

National Environmental Policy Act (NEPA)

NMFS is currently preparing an Environmental Assessment (EA), pursuant to NEPA, to determine whether the issuance of an IHA to Shell for its 2012 drilling activities may have a significant impact on the human environment. NMFS expects to release a draft of the EA for public comment, and will inform the public, through the **Federal Register** and posting on our Web site, once a draft is available (see **ADDRESSES**).

Request for Public Comment

As noted above, NMFS requests comment on our analysis, the draft authorization, and any other aspect of the Notice of Proposed IHA for Shell's 2012 Beaufort Sea exploratory drilling program. Please include, with your comments, any supporting data or literature citations to help inform our final decision on Shell's request for an MMPA authorization.

Dated: October 31, 2011.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–28641 Filed 11–4–11; 8:45 am]

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FEDERAL REGISTER

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Part IV

Department of Housing and Urban Development

Delegation of Authority and Order of Succession for the Office of the Chief Human Capital Officer; Notices

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5562–D–01]

Delegation of Authority for the Office of the Chief Human Capital Officer

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of delegation of authority.

SUMMARY: Through this notice, the Secretary delegates all authority under the Chief Human Capital Officers Act of 2002 to the Chief Human Capital Officer. The Chief Human Capital Officer reports to the Chief Operating Officer, as described in the **Federal Register** notice published on June 14, 2011 at 76 FR 34745.

DATES: *Effective Date:* October 20, 2011.

FOR FURTHER INFORMATION CONTACT: Lynette Warren, Office of the Chief Human Capital Officer, Policy Development and Advisory Services, Department of Housing and Urban Development, 451 Seventh Street SW., Room 2182, Washington, DC 20410; telephone number (202) 402–4169 (this is not a toll-free number). Persons with hearing or speech impairments may call HUD's toll-free Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Chief Human Capital Officers Act of 2002 was enacted as part of the Homeland Security Act of 2002 (Pub. L. 107–296, section 1301 *et seq.;* 5 U.S.C. 1401) on November 25, 2002 (CHCO Act). The CHCO Act requires the Department to establish the position of Chief Human Capital Officer (CHCO) to advise the Secretary and other agency officials in carrying out the agency's responsibilities for selecting, developing, training, and managing a high-quality, productive workforce in accordance with merit system principles; to implement the rules and regulations of the President and the Office of Personnel Management and the laws governing the civil service within the Department; and to carry out such functions as the primary duty of the Chief Human Capital Officer. As described in a notice published on June 14, 2011, at 76 FR 34745, the Deputy Secretary delegated authority to manage and supervise the operations of the Office of the CHCO to the Chief Operating Officer.

Section A. Authority Delegated

1. The CHCO is hereby delegated all authority and assigned all responsibility for human capital management within HUD, including, without limitation, the following:

(a) Managing and administering all aspects of the Department's programs including, but not limited to: Position classification, position management, pay administration, benefits and retirement counseling, employee assistance, and employee health and wellness, which may include reasonable accommodation, personnel actions processing, buyouts, furloughs, maintenance of official personnel records, personnel security, and other like or related policies and programs related to Human Resources management and administration;

(b) Handling the full range of Executive Personnel Programs and operations and providing services for employees in the Senior Executive Service, at the Executive Level, in the Senior Level system, and Schedule C appointees, experts, and consultants;

(c) Managing the Department's performance management programs, overseeing the execution of the annual performance appraisal cycle, overseeing and executing the Incentive Awards Program, providing training to managers and employees, and performing related customer advisory services and outreach support;

(d) Developing and implementing departmental policy guidance for human capital management and programs, administering leadership and employee development programs, administering general and managerial skills training for Headquarters and field employees, and conducting workforce analysis and succession planning;

(e) Directing the development of integrated systems and managing the Office of the Chief Human Capital Officer's human resource information technology inventory and strategies;

(f) Under 5 U.S.C. 7114(c), approve all federal labor management agreements, including employee negotiated agreements, renegotiations, supplements, and other related agreements;

(g) Approve personnel actions involving positions at the GS–15 level and below or equivalent in the competitive and excepted service;

(h) Approve personnel actions involving positions above the GS–15 or equivalent level not requiring Executive Resources Board approval;

(i) Approve personnel actions relating to the appointment of experts and consultants pursuant to 42 U.S.C. 3535(e);

(j) Approve developmental or training assignments external to HUD of one year or less;

(k) Administer the oath of office under 5 U.S.C. 2903 and execute appointment affidavits for all HUD appointments where such oaths and affidavits are required;

(l) Exercise the functions granted regarding giving preferences to employees who have had a prohibited personnel action taken against them under 5 U.S.C. 3352. This authority may not be redelegated further;

(m) Waive the biweekly limitation on General Schedule premium pay for emergency situations or work that is critical to the mission of HUD under 5 U.S.C. 5547(b);

(n) Approve performance-based cash awards up to $10,000 under 5 U.S.C. 4505a and 5 CFR part 451;

(o) Approve dual compensation waivers pursuant to section 1122 of the National Defense Authorization Act for Fiscal Year 2010 (5 U.S.C. 8344);

(p) Approve temporary assignments outside of the Department to other federal agencies or allowable organizations; and

(q) Approve waivers of overpayment and salary offset as designated by the Secretary or Deputy Secretary.

2. In addition to the human capital authorities described above, the Chief Human Capital Officer is hereby delegated authority to carry out the following responsibilities:

(a) Provide for the maintenance and safety of all facilities within the Department (Headquarters and field), including, but not limited to:

(i) Real and personal property management;

(ii) Fleet management;

(iii) Operations;

(iv) Energy and environmental management;

(v) Telecommunications management;

(vi) Safety and health program management;

(vii) Records and directives management;

(viii) Mail distribution and management,

(ix) Printing and graphic arts services;

(x) Physical security and investigations services;

(b) Developing and issuing departmental policy for facilities services;

(c) Managing the Salaries and Expenses budget functions and providing oversight of Office of the Chief Human Capital Officer contracts;

(d) Developing and administering the Department's Transit Subsidy program and Purchase Charge Card Program;

(e) Serving as the central control and coordination point for the management of correspondence to and from the Secretary and the Deputy Secretary, correspondence received in Headquarters from Congress and elected officials, and other correspondence, as appropriate; and

(f) Processing Freedom of Information Act requests.

3. The CHCO has full authority to waive any requirements in any policy and/or program developed, administered, and/or managed by the OCHCO.

The CHCO will perform such additional duties as may be assigned to the CHCO by applicable law or regulation.

Section B. Authority To Redelegate

The Chief Human Capital Officer may redelegate this authority.

Section C. Authority Excepted

The authority delegated in this document does not include the authority to sue or be sued or to issue or waive regulations.

Section D. Authority Superseded

This Redelegation supersedes any previous delegation of authority to the Assistant Secretary for Administration or the Chief Human Capital Officer.

Authority: Section 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d).

Dated: October 20, 2011.

Shaun Donovan,

Secretary.

[FR Doc. 2011–28673 Filed 11–4–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5562–D–02]

Order of Succession for the Office of the Chief Human Capital Officer

AGENCY: Office of the Chief Human Capital Officer, HUD.

ACTION: Notice of order of succession.

SUMMARY: In this notice, the Chief Human Capital Officer for the Department of Housing and Urban Development designates the Order of Succession for the Office of the Chief Human Capital Officer.

DATES: *Effective Date: October 20, 2011.*

FOR FURTHER INFORMATION CONTACT: Lynette Warren, Office of the Chief Human Capital Officer, Department of Housing and Urban Development, 451 7th Street SW., Room 2182, Washington DC 20410; telephone number (202) 402–4169 (this is not a toll-free number). Persons with hearing or speech impairments may call HUD's toll-free Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Chief Human Capital Officer for the Department of Housing and Urban Development is issuing this Order of Succession of officials authorized to perform the functions and duties of the Office of the Chief Human Capital Officer when, by reason of absence, disability, or vacancy in office, the Chief Human Capital Officer is not available to exercise the powers or perform the duties of the office. This Order of Succession is subject to the provisions of the Federal Vacancies Reform Act of 1998 (5 U.S.C. 3345–3349d).

Accordingly, the Chief Human Capital Officer designates the following Order of Succession:

Section A. Order of Succession

Subject to the provisions of the Federal Vacancies Reform Act of 1998, during any period when, by reason of absence, disability, or vacancy in office, the Chief Human Capital Officer for the Department of Housing and Urban Development is not available to exercise the powers or perform the duties of the Chief Human Capital Officer, the following officials within the Office of the Chief Human Capital Officer are hereby designated to exercise the powers and perform the duties of the office:

1. Deputy Chief Human Capital Officer;

2. Director, Office of Human Capital Services;

3. Director, Office of Support Services; and

4. Director, Office of Human Capital Field Support.

These officials shall perform the functions and duties of the office in the order specified herein, and no official shall serve unless all the other officials, whose position titles precede his/hers in this order, are unable to act by reason of absence, disability, or vacancy in office.

Authority: Section 7(d), Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: October 20, 2011.

Karen Newton Cole,

Acting Chief Human Capital Officer.

[FR Doc. 2011–28674 Filed 11–4–11; 8:45 am]

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Part V

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 866

Microbiology Devices; Classification of In Vitro Diagnostic Device for Yersinia Species Detection and Draft Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: In Vitro Diagnostic Devices for Yersinia Species Detection; Availability; Proposed Rule and Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 866

[Docket No. FDA–2011–N–0729]

Microbiology Devices; Classification of In Vitro Diagnostic Device for Yersinia Species Detection

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to classify in vitro diagnostic devices for *Yersinia* species (spp.) detection into class II (special controls), in accordance with the recommendation of the Microbiology Devices Advisory Panel (the panel). FDA is publishing in this document the recommendation(s) of the panel regarding the classification of this device. After considering public comments on the proposed classification, FDA will publish a final regulation classifying this device.

DATES: Submit either electronic or written comments by February 6, 2012. See section IV of this document for the proposed effective date of a final rule based on this proposed rule.

ADDRESSES: You may submit comments, identified with the FDA docket number found in brackets in the heading of this document, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

Written Submissions

Submit written submissions in the following ways:

- FAX: (301) 827–6870.
- Mail/Hand delivery/Courier (For paper, disk, or CD–ROM submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2011–N–0729 for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov*, including any personal information provided. For additional information on submitting comments, see the ''Request for Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beena Puri, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5553, Silver Spring, MD 20993–0002, (301) 796–6202.

SUPPLEMENTARY INFORMATION:

I. Background

A. Legal Authority

The Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 301 *et seq.*), as amended by the Medical Device Amendments of 1976 (Pub. L. 94–295), the Safe Medical Devices Act of 1990 (Pub. L. 101–629), the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Public Law 105–115), the Medical Device User Fee and Modernization Act (Pub. L. 107–250), and the Food and Drug Administration Amendments Act of 2007 (Pub. L. 110–85), among other amendments, established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval). Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability for comment of the draft guidance document that FDA proposes to designate as a special control for this device. In addition, the proposed rule would establish as a special control limitations on the distribution of this device.

Under section 513 of the FD&C Act, FDA refers to devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), as ''preamendments devices.'' FDA classifies a device after it: (1) Receives a recommendation from a device classification panel (an FDA advisory committee); (2) publishes the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) publishes a final regulation classifying the device type (see section 513(d) of the FD&C Act). FDA has classified most preamendments devices under these procedures.

FDA refers to devices that were not in commercial distribution before May 28, 1976, as ''postamendments devices.'' These devices are classified automatically by statute (section 513(f) of the FD&C Act) into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval, unless and until: (1) FDA reclassifies the device into class I or II; (2) FDA issues an order classifying the device into class I or II in accordance with section 513(f)(2) of the FD&C Act, as amended by the FDAMA; or (3) FDA issues an order finding the device to be substantially equivalent, under section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to previously offered devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and 21 CFR part 807 of the regulations.

A person may market a preamendments device that has been classified into class III through premarket notification procedures, without submission of a premarket approval application until FDA promulgates a final regulation under section 515(b) of the FD&C Act (21 U.S.C. 360e(b)) requiring premarket approval.

Consistent with the FD&C Act and the regulations, FDA consulted with the panel, regarding the classification of this device.

B. Regulatory History of In Vitro Diagnostic Devices for Yersinia spp. Detection

After the enactment of the Medical Device Amendments of 1976, FDA undertook to identify and classify all preamendments devices, in accordance with section 513(b) of the FD&C Act. However, in vitro diagnostic devices for *Yersinia* spp. detection were not identified and classified in this initial effort. FDA subsequently identified several preamendments devices for *Yersinia* spp. detection, including *Yersinia* spp. antisera conjugated with a fluorescent dye (immunofluorescent reagents) used to presumptively identify *Yersinia*-like organisms in clinical specimens, antigens used to identify antibodies to *Y. pestis* (Fraction 1) in serum, and bacteriophage used for differentiating *Y. pestis* from other

Yersinia spp. based on susceptibility to lysis by the phage.

Consistent with the FD&C Act and the regulations, FDA held a panel meeting on March 7, 2002, regarding the classification of the preamendments in vitro diagnostic devices for *Yersinia* spp. detection. After the panel meeting FDA found one additional in vitro diagnostic device for *Yersinia* spp. detection to be substantially equivalent to a preamendment device within that type. The additional device has the same intended use as its predicate device but makes use of newer nucleic acid amplification technology (NAAT). While it exhibits technological differences from the preamendments *Yersinia* spp. detection devices, FDA has determined that it is as safe and effective as, and does not raise different questions of safety and effectiveness from its predicate (see section 513(i) of the FD&C Act).

II. Panel Recommendation

At a public meeting held on March 7, 2002, the panel recommended that in vitro diagnostic devices for *Yersinia* spp. detection (Ref. 1) be classified into class II.

A. Identification

FDA is proposing the following identification based on the panel's recommendation and the available information. An in vitro diagnostic device for *Yersinia* spp. detection is used to detect and differentiate among *Yersinia* spp. and presumptively identify *Y. pestis* and other *Yersinia* spp. from cultured isolates or clinical specimens as an aid in the diagnosis of plague and other diseases caused by *Yersinia* spp. This device may consist of *Yersinia* spp. antisera conjugated with a fluorescent dye (immunofluorescent reagents) used to presumptively identify *Yersinia*-like organisms in clinical specimens or bacteriophage used for differentiating *Y. pestis* from other *Yersinia* spp. based on susceptibility to lysis by the phage or antigens used to identify antibodies to *Y. pestis* (Fraction 1) in serum. Diseases caused by *Yersinia* infections include three different forms of plague (bubonic, pneumonic, and septicemic), caused by *Y. pestis,* and gastrointestinal infection, caused by *Y. pseudotuberculosis* and *Y. enterocolitica.*

B. Classification Recommendation

The panel recommended that in vitro diagnostic devices for *Yersinia* spp. detection be classified into class II. The panel believed that class II with special controls (guidance document and limitations on the distribution) would provide reasonable assurance of the safety and effectiveness of the device.

C. Summary of Reasons and Data To Support the Recommendation

The panel considered information from the literature presented by FDA (Refs. 2 to 7), information presented at the meeting by representatives from the United States Army Medical Research Institute for Infectious Diseases who shared the historical perspective on their institution's use of devices for the detection of *Y. pestis* and their personal experience using these devices, and the panel's personal knowledge and experience.

Evidence presented to the panel addressed how the preamendments devices of this type work and some of their limitations. Bacteriophage tests are used for differentiating *Y. pestis* from *Y. pseudotuberculosis.* The test is performed at 20–25 °C because the bacteriophage can lyse *Y. pseudotuberculosis* at 37 °C but not at lower temperatures. Lysis at 22–25 °C provides presumptive evidence that a culture isolate is *Y. pestis.* The fluorescent antibody reagent is a fluorescein-labeled antibody against Fraction 1 (F1) antigen that is used to microscopically visualize specific binding with cultured bacteria. A protein from the capsular envelope of *Y. pestis* is used to microscopically visualize specific binding with cultured bacteria. The test can be performed with culture growth or can be done on clinical specimens that have gram-negative bacteria resembling *Y. pestis.* The presence of F1 antigen is presumptive evidence of *Y. pestis,* which must be confirmed with other testing. F1 antigen can be used to sensitize sheep erythrocytes for hemagglutination testing to detect antibody responses to F1 in human sera. Significant levels of human antibody to this antigen can be retrospective confirmation of *Y. pestis* infection or can be presumptive of *Y. pestis* infection when a single serum sample is tested.

The panel discussed considerations about use of these devices, including the training, experience, and facilities necessary for safe handling of test materials and specimens, and for appropriate test execution and interpretation of test results. They also discussed the desirability of coordination by public health Agencies, including the Centers for Disease Control and Prevention, to ensure that appropriate performance standards and use guidelines are developed for these tests and to encourage that test results be reported to public health authorities.

The panel recommended that in vitro diagnostic devices for *Yersinia* spp. detection should be classified into class II because they concluded that special controls, in addition to general controls, would provide reasonable assurance of the safety and effectiveness of the device, and there is sufficient information to establish special controls to provide such assurance.

D. Risks to Health

Based on the panel's discussion and recommendations, and FDA's experience with these devices, we believe the following are risks to health associated with the use of the device type.

Failure of in vitro diagnostic devices for *Yersinia* spp. detection to perform as indicated or an error in interpretation of results may lead to misdiagnosis and improper patient management or inaccurate epidemiological information that may contribute to inappropriate public health responses. FDA believes that this type of device presents risks associated with a false-negative test result and a false-positive test result, as explained in this document. In addition, there may be risks to laboratory workers resulting from handling positive cultures and control materials.

A false-positive result may lead to a medical decision causing a patient to undergo unnecessary or ineffective treatment, as well as inaccurate epidemiological information on the presence of plague disease in a community. A false-negative result may lead to delayed recognition by the physician of the presence or progression of disease and inaccurate epidemiological information to control and prevent additional infections. A false-negative result could potentially delay diagnosis and treatment of infection caused by *Y. pestis* or other *Yersinia* spp.

Additionally, exposure to organisms potentially present in test specimens and those used as control materials poses a risk of infection of *Yersinia* to laboratory workers.

E. Special Controls

Based on the panel's discussion and recommendations, FDA believes that, in addition to general controls, the proposed special controls discussed in this document are adequate to address the risks to health.

FDA believes that the draft guidance document entitled ''Class II Special Controls Guidance Document: In Vitro Diagnostic Devices for *Yersinia* spp. Detection'' and limitations on distribution of these devices, set forth in the proposed classification regulation,

will address the risks identified previously in this document and provide a reasonable assurance of safety and effectiveness of the device. The class II special controls guidance document provides information on how to meet premarket (510(k)) submission requirements for the assays in sections that discuss performance studies and labeling. The guidance document provides specific recommendations for NAAT tests and tests using the technologies employed by the preamendments devices. The performance studies section of the guidance describes studies to demonstrate appropriate performance and control against assays that may otherwise fail to perform to acceptable standards. The labeling section of the guidance addresses factors such as directions for use, quality control, and precautions for use and interpretation. The special controls guidance recommendations will allow the manufacturer to identify the causes of false-positive and false-negative test results and appropriately label their device to limit the occurrence of false positives and false negatives.

In addition, FDA proposes as a special control that distribution of these devices be limited to laboratories with experienced personnel who have training in principles and use of microbiological culture identification methods and infectious disease diagnostics, and with appropriate biosafety equipment and containment. As noted, the panel was concerned about improper use of these devices and recommended that these devices be used only by personnel sufficiently skilled to maximize their performance and to appropriately interpret and make use of test results. FDA believes that this proposed distribution limitation will appropriately help assure the safe and effective use of these devices and that it is consistent with the intent of the panel in its discussion of limitations on the use of the devices and on monitoring of test results.

TABLE 1—RISKS TO HEALTH AND MITIGATION MEASURES

Identified risks	Mitigation measures
A false-negative test result may lead to delay of therapy and progression of disease and epidemiological failure to promptly recognize disease in the community.	Device description—recommended. Performance studies—recommended. Labeling—recommended. Limited distribution—required.
A false-positive test result may lead to unnecessary treatment and incorrect epidemiological information that leads to unnecessary prophylaxis and management of others.	Device description—recommended. Performance studies—recommended. Labeling—recommended. Limited distribution—required.
Biosafety and a risk of transmission of *Yersinia* infection to laboratory workers handling test specimens and control materials.	Labeling—recommended. Limited distribution—required.

III. Proposed Classification

FDA agrees with the panel's recommendation that in vitro diagnostic devices for *Yersinia* spp. detection should be classified into class II because special controls, in addition to general controls, will provide reasonable assurance of the safety and effectiveness of the device, and there is sufficient information to establish special controls to provide such assurance.

IV. Proposed Effective Date

FDA proposes that any final regulation based on this proposal become effective 30 days after its date of publication in the **Federal Register**.

V. Environmental Impact

The Agency has determined that under 21 CFR 25.34(b) this classification action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Analysis of Impacts

A. Introduction

FDA has examined the impacts of the proposed rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct Agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Agency believes that this proposed rule is not a significant regulatory action as defined by the Executive Order 12866.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this proposed rule would create no new burdens, the Agency proposes to certify that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $136 million, using the most current (2010) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this proposed rule to result in any 1-year expenditure that would meet or exceed this amount.

B. Need for Regulation

In vitro diagnostic devices used to identify and differentiate among *Yersinia* spp. are currently unclassified preamendment devices. Heightened interest in biological warfare and bioterrorism has generated interest in devices that would identify *Y. pestis,* the pathogen responsible for plague and other diseases. FDA has identified information for the safe and effective use of such devices and has applied this information in its clearance of a device that identifies *Y. pestis.* However, the lack of a formal device classification and published guidance may deter additional firms from entering the market for such devices. Devices are typically classified, and these designations are published in the **Federal Register**.

Market failure can occur when market participants lack important information or when they possess incorrect information. Because this device lacks a

formal classification and published data recommendations, potential manufacturers may be unable to assess whether to enter this market. Even manufacturers in possession of these standards that would otherwise enter this market might interpret the absence of a formal classification as FDA uncertainty about its premarket review requirements or that FDA may be about to change these requirements, making market entry seem riskier than it is. The market failure we intend to address is one of imperfect information. Classifying this device would provide valuable information to manufacturers about what is needed to obtain FDA clearance. Manufacturers lacking this information might choose not to enter the market for this device when a well-informed manufacturer would. Moreover, the submission process may be unclear to both manufacturers and FDA because the data requirements are not clearly articulated.

C. Background

Y. pestis, the causative agent of plague, is associated with over 100 million deaths worldwide during three historical pandemics. Rodents and other mammals have historically served as reservoirs of plague, while fleas feeding on these animals are vectors that can transmit the disease to humans. Improved urban sanitary conditions, including improved rodent control, has dramatically reduced the incidence of plague, while availability of antibiotics has dramatically lowered the mortality rate.

Plague has been endemic in the continental United States since at least 1900. The United States averaged 18 cases of plague per year in the 1980s and 9 cases per year since 1990. In 2006, a total of 13 human plague cases were reported among residents of four states. This is the largest number of cases reported in a single year in the United States since 1994. Two of the 13 cases were fatal.

Those infected with plague are likely to survive if they are treated with antibiotics soon after the symptoms appear. Treatment generally consists of taking antibiotics for at least 7 days. Without treatment, mortality is 60 percent for bubonic plague and 100 percent for pneumonic and septicemic plague. The primary public health issue associated with plague, however, would be its potential use in warfare or in an act of terrorism, where hundreds or thousands of individuals could be infected. Effective treatment would require rapid diagnosis, the timely administration of antibiotics, and public health measures to minimize the risk of further infection.

In the event of a potential massive plague outbreak, one would want to be able to test for *Y. pestis* quickly and accurately. Rapid identification of *Y. pestis* and diagnosis of plague would improve the ability to treat infected individuals and minimize the chances of infecting others. Reducing the likelihood of false-negative testing results would minimize the possibility that infected individuals would be left untreated and that the disease would go undetected by public health officials. Reducing the likelihood of false-positive testing results would minimize potential costs associated with unnecessary therapy and unnecessary infection control measures.

The Microbiology Devices Panel met March 7, 2002, to recommend a classification for in vitro diagnostic products for the identification of *Yersinia* spp. The panel recommended that the devices be classified as class II, without exemption from premarket notification requirements, and that special controls include testing guidelines, performance characteristics, and restrictions on distribution. FDA generally concurs with these recommendations.

In vitro diagnostic devices for *Yersinia* spp. detection are preamendment, unclassified devices. As such, manufacturers of new devices for *Yersinia* spp. detection may market these devices through premarket notification procedures and are not required to submit premarket approval applications. In 2007, a manufacturer obtained FDA clearance for a device to detect *Y. pestis* through the 510(k) premarket notification procedures. Throughout the process, FDA advised the applicant on the studies that would establish the performance characteristics of the device, device labeling, and distribution restrictions to demonstrate substantial equivalence to a preamendment device. This data submission was consistent with the recommendations of the 2002 panel. Absent this rulemaking effort, FDA would continue to regulate this device in this fashion.

D. Description of the Proposed Rule

Through this proposal, FDA intends to follow the recommendations of the 2002 Microbiology Devices Panel. This proposed rule would place devices used for the in vitro identification of *Yersinia* spp. into class II (special controls). General controls alone would be inadequate for safe and effective use, and the class III premarket application process would be unnecessary. The proposed special controls are consistent with the principle of applying the appropriate regulatory control necessary to provide reasonable assurance of safety and effectiveness. The application of this intermediate level of regulatory oversight and these specific special controls would be consistent with FDA's treatment of other devices with similar risk profiles. Reagents for detection of specific novel influenza A viruses, for example, are class II devices.

In addition to the general controls, FDA would require special controls in the form of a guidance document that would include recommendations for the types of information that should be included in premarket submissions and restrictions on device distribution. The guidance document would include a section on performance characteristics, describing studies to demonstrate appropriate device performance, and a section on labeling that would include device intended use, instructions for use of the device, precautions, and the interpretation and reporting of test results. The special controls would also include the restricted distribution of these devices. Under these special controls, the device would be limited to laboratories with experienced personnel who have training in principles and use of microbiological culture identification methods and infectious disease diagnostics, and with appropriate biosafety equipment and containment. These specific special controls are needed because of the public health issues associated with *Y. pestis* infection.

Erroneous test results when testing for *Y. pestis* can result in serious public health consequences. Individuals infected with *Y. pestis* are unlikely to survive if they are not treated in a timely manner. In the case of a potential massive outbreak of *Y. pestis,* such as might occur with the use of the pathogen as an instrument of bioterrorism, the potential consequences could be substantial. False negatives or otherwise mishandled test results could not only delay the treatment of infected individuals, but also could prevent public health officials from taking steps to prevent the transmission of plague to others. False positives could lead to unnecessary use of antibiotics and patient isolation, and would have serious economic and public health consequences if the reporting of these results were to contribute to a public health panic.

FDA intends to address risks to public health not adequately controlled by general controls through special controls. The device description section of the special controls guidance

document would explain to manufacturers the need to include in the premarket submission information on the nature of the device and its proper use. The section on performance studies would recommend the types of information and data manufacturers need to collect in order to establish the performance of their device, clarifying regulatory requirements. The special control on labeling would provide users with information on the device's intended use, directions for use, interpretation of results, and potential precautions. The control on distribution would ensure that those using this device would have the training and equipment needed to perform the test safely and effectively, and that test results would be appropriately reported to the public health authorities.

E. Costs and Benefits of the Proposed Regulation

This proposed rule would not create any additional burdens or directly result in significant benefits. Both current practice and this proposed rule are applications of the recommendations of the 2002 Microbiology Devices Advisory Panel. The requirements associated with class II and the chosen special controls do not change the requirements FDA imposes on manufactures. Indirectly, however, the classification of this device and publication of the special controls would benefit both manufacturers and FDA. Manufacturers would benefit from published regulatory requirements in that they would know the burdens associated with entering this market before starting the premarket notification process, and they would submit premarket notification submissions containing the appropriate information. Improved knowledge of the submission requirements would reduce the need for consultation with FDA during the clearance process to facilitate FDA review and accelerate product availability. Classification of this device and publication of the requirements would also reduce FDA resources consumed in these consultations and improve premarket review consistency.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this proposed rule would impose no new burdens, the Agency proposes to certify that this proposed rule would not have a significant economic impact on a substantial number of small entities.

VII. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires agencies to ''construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.'' Federal law includes an express preemption provision that preempts certain state requirements ''different from or in addition to'' certain federal requirements applicable to devices. 21 U.S.C. 360k; See *Medtronic* v. *Lohr,* 518 U.S. 470 (1996); *Riegel* v. *Medtronic, Inc.* 552 U.S. 312 (2008). The special controls established by this proposed rule, if finalized, would create ''requirements'' to restrict the distribution of these devices and to address each identified risk to health presented by these specific medical devices under 21 U.S.C. 360(k), even though product sponsors may have flexibility in how they meet those requirements Cf. *Papike* v. *Tambrands, Inc.,* 107 F.3d 737, 740–42 (9th Cir. 1997).

VIII. Paperwork Reduction Act of 1995

FDA tentatively concludes that this proposed rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required. FDA also concludes that the special controls guidance document identified by this rule refers to previously approved collections of information found in FDA regulations. Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice announcing the availability of a guidance entitled ''Class II Special Controls Guidance Document: In Vitro Diagnostic Devices for *Yersinia* spp. Detection.'' The notice contains an analysis of the paperwork burden for the guidance.

IX. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

X. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site address, but FDA is not responsible for any subsequent changes to the Web site after this document publishes in the **Federal Register**.)

1. Transcript of the FDA Microbiology Devices Panel meeting, March 7, 2002 (*http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfAdvisory/details.cfm?mtg=348*).
2. Bibel, D.J. and T.H. Chen, ''Diagnosis of Plague: An Analysis of the Yersin-Kitasato Controversy,'' vol. 40, pp. 633–651, *Bacteriological Reviews,* 1976.
3. Cavanaugh, DC and S.F. Quan, ''Rapid Identification of *Pasteurella pestis* Using Specific Bacteriophage Lyophilized on Strips of Filter Paper; a Preliminary Report,'' vol. 23, pp. 619–620, *American Journal of Clinical Pathology,* 1953.
4. Chen, T.H. and K.F. Meyer, ''An Evaluation of *Pasteurella pestis* Fraction-1–Specific Antibody for the Confirmation of Plague Infections,'' vol. 34, pp. 911–918, *Bulletin of the World Health Organization,* 1966.
5. Marshall, J.D., Jr., J.A. Mangiafico, and D.C. Cavanaugh, ''Comparison of the Reliability and Sensitivity of Three Serological Procedures in Detecting Antibody to *Yersinia pestis* (Pasteurella pestis),'' vol. 24, pp. 202–204, *Applied Microbiology,* 1972.
6. Perry, R.D. and J.D. Fetherston, ''*Yersinia pestis*—Etiologic Agent of Plague,'' vol. 10, pp. 35–66, *Clinical Microbiology Reviews,* 1997.
7. Rust J.H., Jr., S. Berman, W.H. Habig, et al., ''Stable Reagent for the Detection of Antibody to the Specific Fraction 1 Antigen to *Yersinia pestis,''* vol. 23, pp. 721–724, *Applied Microbiology,* 1972.

List of Subjects in 21 CFR Part 866

Biologics, Laboratories, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 866 is amended as follows:

PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES

1. The authority citation for 21 CFR part 866 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

2. Section 866.3945 is added to subpart D to read as follows:

§ 866.3945 In vitro diagnostic device for Yersinia spp. detection.

(a) *Identification.* An in vitro diagnostic device for *Yersinia* spp.

detection is a device that is used to detect and differentiate among *Yersinia* spp. and presumptively identify *Y. pestis* and other *Yersinia* spp. from cultured isolates or clinical specimens as an aid in the diagnosis of plague and other diseases caused by *Yersinia* spp. Diseases caused by *Yersinia* infections include three different forms of plague (bubonic, pneumonic, and septicemic), caused by *Y. pestis,* and gastrointestinal infection, caused by *Y. pseudotuberculosis* and *Y. enterocolitica.* This device may consist of *Yersinia* spp. antisera conjugated with a fluorescent dye (immunofluorescent reagents) used to presumptively identify *Yersinia*-like organisms in clinical specimens or bacteriophage used for differentiating *Y. pestis* from other *Yersinia* spp. based on susceptibility to lysis by the phage; or antigens used to identify antibodies to *Y. pestis* (Fraction 1) in serum.

(b) *Classification.* Class II (special controls). The special controls are:

(1) ''Class II Special Controls Guidance Document: In Vitro Diagnostic Devices for *Yersinia* spp. Detection; Guidance for Industry and Food and Drug Administration Staff.'' See § 878.1(e) for availability information of this guidance document; and

(2) Distribution is limited to laboratories with experienced personnel who have training in principles and use of microbiological culture identification methods and infectious disease diagnostics, and with appropriate biosafety equipment and containment.

Dated: November 1, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–28724 Filed 11–4–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0730]

Draft Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: In Vitro Diagnostic Devices for Yersinia Species Detection; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance entitled ''Class II Special Controls Guidance Document: In Vitro Diagnostic Devices for *Yersinia* Species Detection.'' This draft guidance document describes a means by which in vitro diagnostic devices for *Yersinia* species (spp.) detection may comply with the requirement of special controls for class II devices. This draft guidance is not final nor is it in effect at this time.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115 (g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by February 6, 2012.

ADDRESSES: Submit written requests for single copies of the draft guidance document entitled ''Class II Special Controls Guidance Document: In Vitro Diagnostic Devices for *Yersinia* spp. Detection'' to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 66, rm. 4613, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to (301) 847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Beena Puri, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 66, Rm. 5553, Silver Spring, MD 20993–0002, (301) 796–6202.

SUPPLEMENTARY INFORMATION:

I. Background

Elsewhere in this issue of the **Federal Register**, FDA is publishing a proposed rule to classify in vitro diagnostic devices for *Yersinia* spp. detection into class II (special controls). This draft special controls guidance document was developed to support the proposed classification of in vitro diagnostic devices for *Yersinia* spp. detection, a previously unclassified preamendments device, into class II (special controls). On March 7, 2002, the Microbiology Devices Advisory Panel (the panel) recommended that in vitro diagnostic devices for *Yersinia* spp. detection be classified into class II. The panel believed that class II with the special controls (guidance document and limitations on the distribution) would provide reasonable assurance of the safety and effectiveness of the device. After the panel meeting, FDA found one additional in vitro diagnostic device for *Yersinia* spp. detection to be substantially equivalent to another device within that type. This device has the same intended use as its predicate device but makes use of newer nucleic acid amplification technology (NAAT). While the NAAT detection devices exhibit technological differences from the preamendments *Yersinia* spp. detection devices, FDA has determined that they are as safe and effective as, and do not raise different questions of safety and effectiveness than, their predicates. (See section 513(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c(i)).)

This draft guidance document identifies the proposed classification regulation, the product code, identifies issues of safety and effectiveness that require special controls, and proposes distribution limitations. FDA believes that the special controls described in the draft guidance when combined with the general controls will be sufficient to provide reasonable assurance of the safety and effectiveness of these devices.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized will represent the Agency's current thinking on in vitro diagnostic devices for *Yersinia* spp. detection. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *http://www.regulations.gov.* To receive ''Class II Special Controls Guidance Document: In Vitro Diagnostic Devices for *Yersinia* spp. Detection,'' you may either send an email request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to (301) 847–8149 to receive a hard copy. Please use the document number 1714 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 807, subpart E have been approved under OMB control number 0910–0120, and the collections of information in 21 CFR part 801 and 21 CFR 809.10 have been approved under OMB control number 0910–0485.

The labeling requirement listed in sections 5 and 8; Intended Use, is not subject to review under the PRA because it is a public disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public (5 CFR 1320.3(c)(2) and 21 CFR 1040.10(g)).

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: November 1, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–28725 Filed 11–4–11; 8:45 am]

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Part VI

Department of Housing and Urban Development

24 CFR Part 17
HUD Debt Collection: Revisions and Update to the Procedures for the Collection of Claims; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 17

[Docket No. FR–5166–F–02]

RIN 2501–AD36

HUD Debt Collection: Revisions and Update to the Procedures for the Collection of Claims

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: On July 5, 2011, HUD published a proposed rule to revise and update HUD's regulations governing the procedures for the collection of claims by HUD. The rule proposed to revise HUD's debt collection regulations to implement the Debt Collection Improvement Act of 1996 and the revised Federal Claims Collection Standards. The DCIA and FCCS generally apply to the collection of nontax debt owed to the Federal Government and require referral of all eligible delinquent nontax debt to the Department of the Treasury for collection by centralized offset and to a designated debt collection center for debt servicing when a debt becomes 180 days delinquent. The rule also proposed to update and make technical corrections to HUD's salary offset provisions to conform to the changes made to HUD's debt collection regulations. HUD is adopting the proposed rule without change. HUD did not receive any public comments on the proposed rule.

DATES: *Effective date:* December 7, 2011.

FOR FURTHER INFORMATION CONTACT: Scott Moore, Financial Operations Analyst, Financial Policy and Procedures Division, Office of the Chief Financial Officer, Department of Housing and Urban Development, 451 7th Street SW., Room 3210, Washington, DC 20410; telephone number (202) 402–2277 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Relay Service at 1–(800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Statutory Background

The Debt Collection Improvement Act of 1996 (DCIA), Public Law 104–134, 110 Stat. 1321, 1358 (approved April 26, 1996) (codified in scattered sections of 31 U.S.C. ch. 37), consolidated within the Department of the Treasury responsibility for the collection of most delinquent nontax debts owed to the Federal Government. The DCIA is implemented through the Treasury's regulations promulgated at 31 CFR part 285 and the revised Federal Claims Collection Standards (FCCS), issued jointly by the Secretary of the Treasury and the Attorney General, which are codified at 31 CFR parts 900 through 904.

The DCIA and FCCS establish a framework for improved Federal Governmentwide debt collection by centralizing the management of debts that are over 180 days delinquent within the Department of the Treasury and by providing Federal agencies with more effective debt collection tools, including recovery through centralized administrative offsets and administrative wage garnishments.

II. Regulatory Background

On July 5, 2011, at 76 FR 39222, HUD published a proposed rule regarding the Treasury Offset Program (TOP), which is a centralized debt collection program that matches information about delinquent debts with information about payments being disbursed by Federal and state disbursing officials, including the Department of the Treasury, the Department of Defense, and U.S. Postal Service payment files. When a match between an eligible payment and an eligible debt occurs, the payment is offset and applied to the debt, up to the amount of the debt or up to the maximum amount allowed by law. As part of this streamlining effort, this rule eliminates provisions in HUD regulations that no longer conform to the DCIA and FCCS, or that simply repeat requirements under the DCIA and FCCS.

For further information on specific changes that HUD proposed to make to its regulations governing the procedures for the collection of claims by HUD please see the preamble to HUD's July 5, 2011, proposed rule (76 FR 39222).

III. This Final Rule

This final rule follows publication of the July 5, 2011, proposed rule. The comment period for the proposed rule closed on September 6, 2011. HUD did not receive any public comments on the proposed rule, and HUD is adopting as final the July 5, 2011, proposed rule without change.

IV. Findings and Certifications

Environmental Impact

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction; or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule revises HUD's regulations at 24 CFR part 17, subpart C, which govern HUD's procedures for the collection of claims owed to HUD or to another Federal agency. These revisions to HUD's regulations are mandated by the DCIA, which directs Federal agencies to update their regulations, and are directed to all entities, small or large, in addition to individuals such as Federal employees. The revisions impose no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments nor preempts state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule will not impose any Federal mandates on any state, local, or tribal governments or the private sector within the meaning of UMRA.

List of Subjects in 24 CFR Part 17

Administrative practice and procedure, Claims, Government employees, Income taxes, Wages.

Accordingly, for the reasons described in the preamble, this rule amends 24 CFR part 17 as follows.

PART 17—ADMINISTRATIVE CLAIMS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 5 U.S.C. 5514; 31 U.S.C. 3701, 3711, 3716–3720E; and 42 U.S.C. 3535(d).

■ 2. Revise subpart C to read as follows:

Subpart C—Procedures for the Collection of Claims by the Government

General Provisions

Administrative Offset and Other Actions

Administrative Wage Garnishment

Salary Offset

General Provisions

§ 17.61 Purpose and scope.

(a) *In general.* HUD will undertake debt collection pursuant to this subpart in accordance with the Debt Collection Improvement Act of 1996, codified in scattered sections of 31 U.S.C. chapter 37; the revised Federal Claims Collection Standards, codified at 31 CFR parts 900 through 904; the Treasury debt collection regulations set forth in 31 CFR part 285; and such additional provisions as provided in this subpart.

(b) *Applicability of other statutes and regulations.* (1) Nothing in this subpart precludes the authority under statutes and regulations other than those described in this subpart to collect, settle, compromise, or close claims, including, but not limited to:

(i) Debts incurred by contractors under contracts for supplies and services awarded by HUD under the authority of subpart 32.6 of the Federal Acquisition Regulation (FAR);

(ii) Debts arising out of the business operations of the Government National Mortgage Association; and

(iii) Debts arising under Title I or section 204(g) of Title II of the National Housing Act (12 U.S.C. 1701 *et seq.*).

(2) This subpart is not applicable to tax debts or to any debt for which there is an indication of fraud or misrepresentation, unless the debt is returned by the Department of Justice to HUD for handling.

(c) *Scope.* Sections 17.65 through 17.79, under the heading Administrative Offset and Other Actions, includes the procedures that apply when HUD seeks satisfaction of debts owed to HUD by administrative offset of payments by the Federal Government other than Federal salary payments, and when HUD takes other administrative actions for nonpayment of debt. Section 17.81, under the heading Administrative Wage Garnishment, includes the procedures that apply when HUD seeks to satisfy a debt owed to HUD out of the debtor's compensation from an employer other than the Federal Government. Sections 17.83 through 17.113, under the heading Salary Offset, include procedures that apply when HUD or another Federal agency seeks to satisfy a debt owed to it through offset of the salary of a current Federal employee.

§ 17.63 Definitions.

As used in this subpart:

Department or HUD means the Department of Housing and Urban Development, and includes a person authorized to act for HUD.

Office means the organization of each Assistant Secretary of HUD or other HUD official at the Assistant Secretary level, and each Field Office.

Office of Appeals or *OA* means the HUD Office of Appeals within the HUD Office of Hearings and Appeals.

Secretary means the Secretary of HUD.

Treasury means the Department of the Treasury.

United States includes an agency of the United States.

Administrative Offset and Other Actions

§ 17.65 Demand and notice of intent to offset.

HUD will make written demand upon the debtor pursuant to the requirements of 31 CFR 901.2 and send written notice of intent to offset to the debtor pursuant to the requirements of 31 CFR 901.3 and 31 CFR part 285, subpart A. The Secretary shall mail the demand and notice of intent to offset to the debtor, at the most current address that is available to the Secretary. HUD may refer the debt to the Treasury for collection and shall request that the amount of the debt be offset against any amount payable by the Treasury as a Federal payment, at any time after 60 days from the date such notice is sent to the debtor.

§ 17.67 Review of departmental records related to the debt.

(a) *Notification by the debtor.* A debtor who intends to inspect or copy departmental records related to the debt pursuant to 31 CFR 901.3 must, within 20 calendar days after the date of the notice in § 17.65, send a letter to HUD, at the address indicated in the notice of intent to offset, stating his or her intention. A debtor may also request, within 20 calendar days from the date of such notice, that HUD provide the debtor with a copy of departmental records related to the debt.

(b) *HUD's response.* In response to a timely notification by the debtor as described in paragraph (a) of this section, HUD shall notify the debtor of the location and the time when the debtor may inspect or copy departmental records related to the debt. If the debtor requests that HUD provide a copy of departmental records related to the debt, HUD shall send the records to the debtor within 10 calendar days from the date that HUD receives the debtor's request. HUD may charge the debtor a reasonable fee to compensate for the cost of providing a copy of the departmental records related to the debt.

§ 17.69 Review within HUD of a determination that an amount is past due and legally enforceable.

(a) *Notification by the debtor.* A debtor who receives notice of intent to offset pursuant to § 17.65 has the right to a review of the case and to present evidence that all or part of the debt is not past due or not legally enforceable. The debtor may send a copy of the notice with a letter notifying the Office of Appeals of his or her intention to present evidence. Failure to give this notice shall not jeopardize the debtor's right to present evidence within the 60 calendar days provided for in paragraph (b) of this section. If the Office of Appeals has additional procedures governing the review process, a copy of the procedures shall be mailed to the debtor after the request for review is received and docketed by the Office of Appeals.

(b) *Submission of evidence.* If the debtor wishes to submit evidence showing that all or part of the debt is not past due or not legally enforceable, the debtor must submit such evidence to the Office of Appeals within 60 calendar days after the date of the notice of intent to offset. Failure to submit evidence will result in a dismissal of the request for review by the OA.

(c) *Review of the record.* After timely submission of evidence by the debtor, the OA will review the evidence submitted by the Department that shows that all or part of the debt is past due and legally enforceable. The decision of an administrative judge of the OA will be based on a preponderance of the evidence as to whether there is a debt that is past due and whether it is legally enforceable. The administrative judge of the OA shall make a determination based upon a review of the evidence that comprises the written record, except that the OA may order an oral hearing if the administrative judge of the OA finds that:

(1) An applicable statute authorizes or requires the Department to consider a waiver of the indebtedness and the waiver determination turns on credibility or veracity; or

(2) The question of indebtedness cannot be resolved by review of the documentary evidence.

(d) *Previous decision by an administrative judge of the Office of Appeals.* The debtor is not entitled to a review of the Department's intent to offset if an administrative judge of the OA has previously issued a decision on the merits that the debt is past due and legally enforceable, except when the debt has become legally unenforceable since the issuance of that decision, or the debtor can submit newly discovered material evidence that the debt is presently not legally enforceable.

§ 17.71 Request for hearing.

The debtor shall file a request for a hearing with the OA at the address specified in the notice or at such other address as the OA may direct in writing to the debtor.

§ 17.73 Determination of the HUD Office of Appeals.

(a) *Determination.* An administrative judge of the OA shall issue a written decision that includes the supporting rationale for the decision. The decision of the administrative judge of the OA concerning whether a debt or part of a debt is past due and legally enforceable is the final agency decision with respect to the past due status and enforceability of the debt.

(b) *Copies.* Copies of the decision of the administrative judge of the OA shall be distributed to HUD's General Counsel, HUD's Chief Financial Officer (CFO), or other appropriate HUD program official, the debtor, and the debtor's attorney or other representative, if any.

(c) *Notification to the Department of the Treasury.* If the decision of the administrative judge of the OA affirms that all or part of the debt is past due and legally enforceable, HUD shall notify the Treasury after the date that the determination of the OA has been issued under paragraph (a) of this section and a copy of the determination has been received by HUD's CFO or other appropriate HUD program official. No referral shall be made to the Treasury if the review of the debt by an administrative judge of the OA subsequently determines that the debt is not past due or not legally enforceable.

§ 17.75 Postponements, withdrawals, and extensions of time.

(a) *Postponements and withdrawals.* HUD may, for good cause, postpone or withdraw referral of the debt to the Treasury.

(b) *Extensions of time.* At the discretion of an administrative judge of the OA, time limitations required in these procedures may be extended in appropriate circumstances for good cause.

§ 17.77 Stay of referral for offset.

If the debtor timely submits evidence in accordance with § 17.69(b), the referral to the Treasury in § 17.65 shall be stayed until the date of the issuance of a written decision by an administrative judge of the OA that determines that a debt or part of a debt is past due and legally enforceable.

§ 17.79 Administrative actions for nonpayment of debt.

(a) *Referrals for nonpayment of debt.* When a contractor, grantee, or other participant in a program sponsored by HUD, fails to pay its debt to HUD within a reasonable time after demand, HUD shall take such measures to:

(1) Refer such contractor, grantee, or other participant to the Office of General Counsel for investigation of the matter and possible suspension or debarment pursuant to 2 CFR part 2424, 2 CFR 180.800, and 48 CFR subpart 9.4 of the Federal Acquisition Regulation (FAR); and

(2) In the case of matters involving fraud or suspected fraud, refer such contractor, grantee, or other participant to the Office of Inspector General for investigation. However, the failure to pay HUD within a reasonable time after demand is not a prerequisite for referral for fraud or suspected fraud.

(b) *Excluded Parties List System (EPLS).* Depending upon the outcome of the referral in paragraph (a) of this section, HUD shall take such measures to insure that the contractor, grantee, or other participant is placed on the EPLS.

(c) *Report to the Treasury.* The failure of any surety to honor its obligations in accordance with 31 U.S.C. 9304 shall be reported to the Chief Financial Officer, who shall inform the Treasury.

Administrative Wage Garnishment

§ 17.81 Administrative wage garnishment.

(a) *In general.* HUD may collect a debt by using administrative wage garnishment pursuant to 31 CFR 285.11. To the extent that situations arise that are not covered by 31 CFR 285.11, those situations shall be governed by 24 CFR part 26, subpart A.

(b) *Hearing official.* Any hearing required to establish HUD's right to collect a debt through administrative wage garnishment shall be conducted by an administrative judge of the OA under 24 CFR part 26, subpart A of part 26.

Salary Offset

§ 17.83 Scope and definitions.

(a) The provisions set forth in §§ 17.83 through 17.113 are the Department's procedures for the collection of delinquent nontax debts by salary offset of a Federal employee's pay to satisfy certain debts owed the government, including centralized salary offsets in accordance with 31 CFR part 285.

(b)(1) This section and §§ 17.85 through 17.99 apply to collections by the Secretary through salary offset from current employees of the Department and other agencies who owe debts to the Department; and

(2) This section, § 17.85, and §§ 17.101 through 17.113 apply to HUD's offset of pay to current employees of the Department and of other agencies who owe debts to HUD or other agencies under noncentralized salary offset procedures, in accordance with 5 CFR 550.1109.

(c) These regulations do not apply to debts or claims arising under the Internal Revenue Code of 1954 (26 U.S.C. 1–9602), the Social Security Act (42 U.S.C. 301–1397f), the tariff laws of the United States, or to any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute.

(d) These regulations identify the types of salary offset available to the Department, as well as certain rights provided to the employee, which include a written notice before deductions begin, the opportunity to petition for a hearing, receiving a written decision if a hearing is granted, and the opportunity to propose a repayment agreement in lieu of offset. These employee rights do not apply to any adjustment to pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less.

(e) Nothing in these regulations precludes the compromise, suspension, or termination of collection actions where appropriate under the Department's regulations contained elsewhere in this subpart (see 24 CFR 17.61 through 17.79).

(f) As used in the salary offset provisions at §§ 17.83 through 17.113:

Agency means:

(i) An Executive department, military department, Government corporation, or independent establishment as defined in 5 U.S.C. 101, 102, 103, or 104, respectively;

(ii) The United States Postal Service; or

(iii) The Postal Regulatory Commission.

Debt means an amount owed to the United States and past due, from sources which include loans insured or guaranteed by the United States and all other amounts due the United States from assigned mortgages or deeds of trust, direct loans, advances, repurchase demands, fees, leases, rents, royalties, services, sale of real or personal property, overpayments, penalties, damages, interest, fines and forfeitures (except those arising under the Uniform Code of Military Justice), and all other similar sources.

Determination means the point at which the Secretary or his designee decides that the debt is valid.

Disposable pay means that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after deductions required by law. Deductions from pay include:

(i) Amounts owed by the individual to the United States;

(ii) Amounts withheld for Federal employment taxes;

(iii) Amounts properly withheld for Federal, state, or local income tax purposes, if the withholding of the amount is authorized or required by law and if amounts withheld are not greater than would be the case if the individual claimed all dependents to which he or she were entitled. The withholding of additional amounts under 26 U.S.C. 3402(i) may be permitted only when the individual presents evidence of tax obligation that supports the additional withholding;

(iv) Amounts deducted as health insurance premiums, including, but not limited to, amounts deducted from civil service annuities for Medicare where such deductions are requested by the Health Care Financing Administration;

(v) Amounts deducted as normal retirement contributions, not including amounts deducted for supplementary coverage. Amounts withheld as Survivor Benefit Plan or Retired Serviceman's Family Protection Plan payments are considered to be normal retirement contributions. Amounts voluntarily contributed toward additional civil service annuity benefits are considered to be supplementary;

(vi) Amounts deducted as normal life insurance premiums from salary or other remuneration for employment, not including amounts deducted for supplementary coverage. Both Servicemembers' Group Life Insurance and ''Basic Life'' Federal Employees' Group Life Insurance premiums are considered to be normal life insurance premiums; all optional Federal Employees' Group Life Insurance premiums and life insurance premiums paid for by allotment, such as National Service Life Insurance, are considered to be supplementary;

(vii) Amounts withheld from benefits payable under title II of the Social Security Act where the withholding is required by law;

(viii) Amounts mandatorily withheld for the U.S. Soldiers' and Airmen's Home; and

(ix) Fines and forfeitures ordered by a court-martial or by a commanding officer.

Employee means a current employee of a Federal agency, including a current member of the Armed Forces or Reserve of the Armed Forces of the United States.

Pay means basic pay, special pay, income pay, retired pay, retainer pay, or, in the case of an employee not entitled to basic pay, other authorized pay.

Salary offset means a deduction from the pay of an employee without his or her consent to satisfy a debt. Salary offset is one type of administrative offset that may be used by the Department in the collection of claims.

Waiver means the cancellation, remission, forgiveness, or nonrecovery of a debt allegedly owed by an employee of an agency as permitted or required by 5 U.S.C. 5584, 10 U.S.C. 2774, 32 U.S.C. 716, or 5 U.S.C. 8346(b), or any other law.

§ 17.85 Coordinating offset with another Federal agency.

(a) *When HUD is owed the debt.* When the Department is owed a debt by an employee of another agency, the other agency shall not initiate the requested offset until the Department provides the agency with a written certification that the debtor owes the Department a debt (including the amount and basis of the debt and the due date of the payment) and that the Department has complied with these regulations.

(b) *When another agency is owed the debt.* The Department may use salary offset against one of its employees who is indebted to another agency if requested to do so by that agency. Such a request must be accompanied by a certification by the requesting agency that the person owes the debt (including the amount) and that the employee has been given the procedural rights required by 5 U.S.C. 5514 and 5 CFR part 550, subpart K.

§ 17.87 Determination of indebtedness.

In determining that an employee is indebted to HUD, the Secretary will review the debt to make sure that it is valid and past due.

§ 17.89 Notice requirements before offset.

Except as provided in § 17.83(d), deductions will not be made unless the Secretary first provides the employee with a minimum of 30 calendar days written notice. This Notice of Intent to Offset Salary (Notice of Intent) will state:

(a) That the Secretary has reviewed the records relating to the claim and has determined that a debt is owed, the amount of the debt, and the facts giving rise to the debt;

(b) The Secretary's intention to collect the debt by means of deduction from the employee's current disposable pay account until the debt and all accumulated interest are paid in full;

(c) The amount, frequency, approximate beginning date, and duration of the intended deductions;

(d) An explanation of the Department's requirements concerning interest, penalties, and administrative costs, including a statement that such assessments must be made unless excused in accordance with the Federal Claims Collection Standards as provided in 31 CFR 901.9 (although this information may alternatively be provided in the demand notice pursuant to 24 CFR 17.65);

(e) The employee's right to inspect and copy Department records relating to the debt or, if the employee or his or her representative cannot personally inspect the records, to request and receive a copy of such records;

(f) The employee's right to enter into a written agreement with the Secretary for a repayment schedule differing from that proposed by the Secretary, so long as the terms of the repayment schedule proposed by the employee are agreeable to the Secretary;

(g) The right to a hearing, conducted in accordance with subpart A of part 26 of this chapter by an administrative law judge of the Department or a hearing official of another agency, on the Secretary's determination of the debt, the amount of the debt, or percentage of disposable pay to be deducted each pay period, so long as a petition is filed by the employee as prescribed by the Secretary;

(h) That the timely filing of a petition for hearing will stay the collection proceedings (See § 17.91);

(i) That a final decision on the hearing will be issued at the earliest practical date, but not later than 60 calendar days after the filing of the petition requesting the hearing, unless the employee requests and the hearing officer grants a delay in the proceedings;

(j) That any knowingly false or frivolous statements, representations, or evidence may subject the employee to:

(1) Disciplinary procedures appropriate under 5 U.S.C. Ch. 75, 5 CFR part 752, or any other applicable statutes or regulations;

(2) Penalties under the False Claims Act, 31 U.S.C. 3729–3731, or any other applicable statutory authority; or

(3) Criminal penalties under 18 U.S.C. 286, 287, 1001, and 1002 or any other applicable statutory authority.

(k) Any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made;

(l) Unless there are applicable contractual or statutory provisions to the contrary, that amounts paid on or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the employee; and

(m) The method and time period for requesting a hearing, including the address of the Office of Appeals to which the request must be sent.

§ 17.91 Request for a hearing.

(a) Except as provided in paragraph (d) of this section, an employee must file a petition for a hearing that is received by the Office of Appeals not later than 20 calendar days from the date of the Department's notice described in § 17.89 if an employee wants a hearing concerning—

(1) The existence or amount of the debt; or

(2) The Secretary's proposed offset schedule.

(b) The petition must be signed by the employee, must include a copy of HUD's Notice of Intent to Offset Salary, and should admit or deny the existence of or the amount of the debt, or any part of the debt, briefly setting forth any basis for a denial. If the employee objects to the percentage of disposable pay to be deducted from each check, the petition should state the objection and the reasons for it. The petition should identify and explain with reasonable specificity and brevity the facts, evidence, and witnesses that the employee believes support his or her position.

(c) Upon receipt of the petition, the Office of Appeals will send the employee a copy of the Salary Offset Hearing Procedures Manual of the Department of Housing and Urban Development.

(d) If the employee files a petition for hearing later than the 20 calendar days as described in paragraph (a) of this section, the hearing officer may accept the request if the employee can show that the delay was because of circumstances beyond his or her control or because of failure to receive notice of the filing deadline (unless the employee has actual notice of the filing deadline).

§ 17.93 Result if employee fails to meet deadlines.

An employee waives the right to a hearing, and will have his or her disposable pay offset in accordance with the Secretary's offset schedule, if the employee:

(a) Fails to file a petition for a hearing as prescribed in § 17.91; or

(b) Is scheduled to appear and fails to appear at the hearing.

§ 17.95 Written decision following a hearing.

Written decisions provided after a request for a hearing will include:

(a) A statement of the facts presented to support the nature and origin of the alleged debt;

(b) The hearing officer's analysis, findings, and conclusions, in light of the hearing, concerning the employee's or the Department's grounds;

(c) The amount and validity of the alleged debt; and

(d) The repayment schedule, if applicable.

§ 17.97 Review of departmental records related to the debt.

(a) *Notification by employee.* An employee who intends to inspect or copy departmental records related to the debt must send a letter to the Secretary stating his or her intention. The letter must be received by the Secretary within 20 calendar days of the date of the Notice of Intent.

(b) *Secretary's response.* In response to timely notice submitted by the debtor as described in paragraph (a) of this section, the Secretary will notify the employee of the location and time when the employee may inspect and copy Department records related to the debt.

§ 17.99 Written agreement to repay debt as alternative to salary offset.

(a) *Notification by employee.* The employee may propose, in response to a Notice of Intent, a written agreement to repay the debt as an alternative to salary offset. Any employee who wishes to do this must submit a proposed written agreement to repay the debt, which is received by the Secretary within 20 calendar days of the date of the Notice of Intent.

(b) *Secretary's response.* In response to timely notice by the debtor as described in paragraph (a) of this section, the Secretary will notify the employee whether the employee's proposed written agreement for repayment is acceptable. It is within the Secretary's discretion to accept a repayment agreement instead of proceeding by offset. In making this determination, the Secretary will balance the Department's interest in collecting the debt against hardship to the employee. If the debt is delinquent and the employee has not disputed its existence or amount, the Secretary will accept a repayment agreement instead of offset only if the employee is able to establish that offset would result in undue financial hardship or would be against equity and good conscience.

§ 17.101 Procedures for salary offset: when deductions may begin.

(a) Deductions to liquidate an employee's debt will be by the method and in the amount stated in the Secretary's Notice of Intent to collect from the employee's current pay.

(b) If the employee filed a petition for hearing with the Secretary before the expiration of the period provided for in § 17.91, then deductions will begin after:

(1) The hearing officer has provided the employee with a hearing; and

(2) The hearing officer has issued a final written decision in favor of the Secretary.

(c) If an employee retires or resigns before collection of the amount of the indebtedness is completed, the remaining indebtedness will be collected according to the procedures for the collection of claims under §§ 17.61 through 17.79.

§ 17.103 Procedures for salary offset: types of collection.

A debt will be collected in a lump sum or in installments. Collection will be by lump-sum collection unless the debt is for other than travel advances and training expenses, and the employee is financially unable to pay in one lump sum, or the amount of the debt exceeds 15 percent of disposable pay. In these cases, deduction will be by installments.

§ 17.105 Procedures for salary offset: methods of collection.

(a) *General.* A debt will be collected by deductions at officially established pay intervals from an employee's current pay account, unless the employee and the Secretary agree to alternative arrangements for repayment. The alternative arrangement must be in writing, signed by both the employee and the Secretary.

(b) *Installment deductions.* Installment deductions will be made over a period not greater than the anticipated period of employment. The size and frequency of installment deductions will bear a reasonable relation to the size of the debt and the employee's ability to pay. However, the amount deducted for any period will not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount. If possible, the installment payment will be sufficient in size and frequency to liquidate the debt in 3 years. Installment payments of less than $25 per pay period or $50 a month will be accepted only in the most unusual circumstances.

(c) *Sources of deductions.* The Department will make deductions only from basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an employee not entitled to basic pay, other authorized pay.

§ 17.107 Procedures for salary offset: imposition of interest.

Interest will be charged in accordance with the Federal Claims Collection Standards as provided in 31 CFR 901.9.

§ 17.109 Nonwaiver of rights.

So long as there are no statutory or contractual provisions to the contrary, no employee involuntary payment (of all or a portion of a debt) collected under these regulations will be interpreted as a waiver of any rights that the employee may have under 5 U.S.C. 5514 or any other provision of contract or law.

§ 17.111 Refunds.

The Department will refund promptly to the appropriate individual amounts offset under these regulations when:

(a) A debt is waived or otherwise found not owing the United States (unless expressly prohibited by statute or regulation); or

(b) The Department is directed by an administrative or judicial order to refund amounts deducted from the employee's current pay.

§ 17.113 Miscellaneous provisions: correspondence with the Department.

The employee shall file a request for a hearing with the Clerk, OA, 409 3rd Street SW., 2nd Floor, Washington, DC 20024, on official work days between the hours of 8:45 a.m. and 5:15 p.m. (or such other address as HUD may provide by notice from time to time). All other correspondence shall be submitted to the Departmental Claims Officer, Office of the Chief Financial Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410 (or such other officer or address as HUD may provide by notice from time to time). Documents may be filed by personal delivery or mail.

Dated: October 26, 2011.

Shaun Donovan,

Secretary.

[FR Doc. 2011–28777 Filed 11–4–11; 8:45 am]

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Part VII

Environmental Protection Agency

40 CFR Part 52

Final Response to Petition From New Jersey Regarding SO_2 Emissions From the Portland Generating Station; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR PART 52

[EPA–HQ–OAR–2011–0081; FRL–9487–8]

RIN 2060–AQ69

Final Response to Petition From New Jersey Regarding SO_2 Emissions From the Portland Generating Station

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is making a finding that the coal-fired Portland Generating Station (Portland), owned and operated by GenOn REMA LLC (GenOn), in Upper Mount Bethel Township, Northampton County, Pennsylvania, is emitting air pollutants in violation of the interstate transport provisions of the Clean Air Act (CAA or Act). Specifically, the EPA finds that emissions of sulfur dioxide (SO_2) from Portland significantly contribute to nonattainment and interfere with maintenance of the 1-hour SO_2 national ambient air quality standard (NAAQS) in New Jersey. This finding is made in response to a petition submitted by the State of New Jersey Department of Environmental Protection (NJDEP) on September 17, 2010. In this action, the EPA is establishing emission limitations and compliance schedules to ensure that Portland will eliminate its significant contribution to nonattainment and interference with maintenance of the 1-hour SO_2 NAAQS in New Jersey. Compliance with these limits will permit the continued operation of Portland beyond the 3-month limit established by the CAA for sources subject to a contribution finding.

DATES: This final rule is effective on January 6, 2012.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2011–0081. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Todd Hawes (919) 541–5591, *hawes.todd@epa.gov*, or Ms. Gobeail McKinley (919) 541–5246, *mckinley.gobeail@epa.gov,* Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail Code C539–04, Research Triangle Park, NC 27711.

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

Section 126(b) of the CAA provides, among other things, that any state or political subdivision may petition the Administrator of the EPA to find that any major source or group of stationary sources in upwind states emits or would emit any air pollutant in violation of the prohibition of section110(a)(2)(D)(i),[1] 42

[1] The text of section 126 codified in the United States Code cross references section 110(a)(2)(D)(ii)

U.S.C. 7426(b). On September 17, 2010, NJDEP filed a section 126 petition requesting that the EPA find that emissions from Portland, located in Upper Mount Bethel Township, Northampton County, Pennsylvania, significantly contribute to nonattainment or interfere with maintenance of the 1-hour SO_2 NAAQS in New Jersey. In this action, the EPA is granting that petition, and basing its finding on the review of NJDEP's air quality modeling, the EPA's independent assessment of the AERMOD [2] dispersion modeling, and other technical analyses. Based on this assessment, the EPA finds that Portland's emissions significantly contribute to nonattainment and interfere with maintenance of the 1-hour SO_2 NAAQS in New Jersey. Pursuant to section 126(c), the EPA is also authorizing continued operation of the plant consistent with emission limitations and compliance schedules (including increments of progress) set forth in this rule to bring the plant into compliance as expeditiously as practicable with the CAA prohibition on emissions that significantly contribute to nonattainment and interfere with maintenance of the 1-hour SO_2 NAAQS. Specifically, the final rule requires Portland to reduce its SO_2 emissions to meet the following limits: 1,105 pounds per hour (lb/hr) for unit 1; 1,691 lb/hr for unit 2; and 0.67 pounds per million metric British units (lb/mmBtu), based on a 30 boiler operating day rolling average, for units 1 and 2. Portland must achieve and maintain these emission limitations by no later than 3 years after the effective date of this rule. The EPA is establishing an interim SO_2 emission limit requirement to ensure that Portland demonstrates appropriate increments of progress toward final compliance. Specifically, no later than 1 year after the effective date of this rule, total SO_2 emissions from units 1 and 2 combined may not exceed 6,253 lb/hr. The final rule also requires Portland to submit to the EPA a dispersion modeling protocol within six months of the effective date of the rule, a modeling analysis demonstrating the elimination of significant contribution to nonattainment and interference with maintenance within 1 year of the effective date of the rule, semi-annual interim progress reports, and a final progress report to demonstrate compliance with the interim and final emission limits. Compliance with the final emission limits established in this rule is sufficient to remedy Portland's significant contribution to nonattainment and interference with maintenance in the impacted areas in New Jersey.

II. Summary of Changes From the April 7, 2011 Proposed Rule

The following is a summary of the significant changes made since proposal. Each of these changes is discussed later in this notice, and, where noted, additional information is provided in other supporting documentation in the docket for this rulemaking. The first change is that the final compliance remedy now includes a heat input-based SO_2 emission limit of 0.67 lb/mmBtu for units 1 and 2, in addition to the proposed SO_2 emission rate limits. The heat-input based SO_2 emission limit is based on a 30 boiler operating day rolling average. This additional requirement was made to address concerns raised by commenters that the proposed compliance remedy was not adequate to ensure attainment of the NAAQS in New Jersey. This issue is discussed in more detail in section V.

Second, the interim emission rate limits, proposed as 2,910 lb/hr for unit 1 and 4,450 lb/hr for unit 2, and having a compliance date of no later than 1 year from the effective date of this rule, are now expressed as a single limit for units 1 and 2 combined, and may not exceed 6,253 lb/hr. The 1-year compliance timeframe remains unchanged. This change to the limit is partly in response to comments (including those from GenOn) in support of greater operational flexibility, and acknowledges that the interim limit need not be unit specific. It is also based on the availability of lower sulfur coal than the coal Portland is currently using. Additional details are provided in section VI.C.

Third, in response to comments that the proposed deadlines for submitting a modeling protocol and modeling analysis were too short, the deadline for submitting the modeling protocol is changed to six months after the effective date of this rule, and the requirement to submit a modeling analysis is changed to 12 months after the effective date of this rule. This will allow Portland more time for planning its modeling analysis but does not change the compliance time frames for meeting the emission limits.

Additionally, in response to comments suggesting the plant needed more than 90 days to determine a method of compliance, the final rule gives Portland 12 months from the effective date to indicate how it intends to achieve full compliance. The EPA agrees that the plant may need 12 months to identify the specific engineering and technology decisions to determine how to reach compliance within 3 years. Accordingly, we are eliminating the proposed requirement for Portland to notify the EPA, within 90 days from the effective date of this rule, whether the plant will continue to operate and comply with the emission limits and compliance schedules, or cease operations. The modeling protocol and the initial semi-annual progress report, due 6 months after the effective date of this rule, will appropriately inform Portland's plans for continuing operation. Finally, the EPA is not requiring separate compliance schedules and analyses should Portland decide to permanently cease operation of unit 1 and unit 2 as a means of compliance. The final and interim emission limits and compliance schedules are appropriate regardless of how Portland ultimately decides to meet them. Thus, we decided it was not necessary, as proposed, to include a separate schedule specifically for a compliance approach based on shutting down.

III. The EPA's Basis for Making the Section 126 Finding for Portland

A. CAA Section 126(b) and Our Legal Authority

The statutory authority for this action is provided by the CAA, as amended, 42 U.S.C. 7401 *et seq.* Section 126 of the CAA provides that any state or political subdivision may petition the Administrator of the EPA to find that any major source or group of stationary sources in upwind states emits or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(D)(i). 42 U.S.C. 7426(b). If the EPA makes such a finding, in order to allow continued operation of the source, the EPA may also issue emission limits and compliance schedules (including increments of progress) to bring the source into compliance as expeditiously as practicable but no later than 3 years from the date of the finding. Absent such emission limits and a compliance schedule, the source may not continue operations beyond 90 days.

Section 110(a)(2)(D) of the CAA, often referred to as the ''good neighbor'' or ''interstate transport'' provision of the Act, addresses interstate transport of air pollution. Under section 110(a)(2)(D)(i), emissions in one state that contribute significantly to nonattainment in, or interfere with maintenance of a NAAQS

instead of section 110(a)(2)(D)(i). The courts have confirmed that this is a scrivener's error and the correct cross reference is to section 110(a)(2)(D)(i), *See Appalachian Power Co.* v. *EPA, 249 F.3d 1032, 1040–44 (DC Cir. 2001).*

[2] AERMOD stands for the American Meteorological Society/Environmental Protection Agency Regulatory Model.

by, any other state, or interfere with measures required to be included in the applicable implementation plan for any other state under part C to prevent significant deterioration of air quality or to protect visibility, are to be prohibited. 42 U.S.C. 7410(a)(2)(D)(i). Findings by the Administrator, made pursuant to section 126, that a source or group of sources emits air pollutants in violation of the section 110(a)(2)(D)(i) prohibition are commonly referred to as section 126 findings. Similarly, petitions submitted pursuant to this section are commonly referred to as section 126 petitions. This action responds to a section 126 petition submitted by the NJDEP. In this action, the EPA makes a section 126 finding with respect to Portland and establishes emission limits and compliance schedules to permit continued operation of the plant.

Several commenters asserted that the EPA cannot, or should not, make such a section 126 finding at this time, but can only make such a finding after the state has submitted what is usually referred to as its ''interstate transport'' or section 110(a)(2)(D) State Implementation Plan (SIP). For the recently promulgated 1-hour SO_2 standard, those SIPs are due on June 3, 2013. We disagree with this interpretation of the Act. The plain language of the statute confirms that section 126 remedies can, and in some cases must, be promulgated prior to the deadline for states to make SIP submissions under section 110(a)(2)(D).

The EPA has consistently interpreted the language in section 126 as referring to a functional prohibition on emissions. This interpretation is supported by the plain language of the statute, the statutory structure, and the legislative history. Further, the EPA notes that the statute does not exempt, for any period of time, violations of the prohibition from scrutiny under section 126. For these reasons, the EPA believes its interpretation is compelled by the statutory language. Nonetheless, to the extent that the statutory language is ambiguous, the EPA's reasonable interpretation of this language is to be accorded deference.

The EPA interprets the language in section 126 as referring to the actual functional prohibition of section 110(a)(2)(D)(i) that bars impermissible interstate transport. The EPA does not agree with the position taken by some commenters that the language refers only to an emissions limitation contained in a state's section 110(a)(2)(D) SIP. Further, there is nothing in the statute to support the argument that the prohibition on emissions does not arise until after the SIP submission deadline, or that a violation of the functional prohibition cannot occur before that deadline. Where the EPA finds such a violation exists, it must, under section 126, issue emission limits and compliance schedules to permit continued operation of the source.

The EPA's interpretation of section 126 acknowledges that Congress created two independent statutory tools—section 110(a)(2)(D)(i) and section 126—to address the problem of interstate pollution transport. The purpose of each provision is to control upwind emissions that contribute significantly to downwind states' nonattainment or maintenance problems. The two provisions differ in that one relies on state regulation and the other relies on federal regulation. Congress provided both provisions without indicating any preference for one over the other, suggesting it viewed either approach as a legitimate means to produce the desired result. Instead, the statutory language creates two independent tools to address the problem. Section 110(a)(2)(D)(i) establishes an obligation for all states to address emissions within the state significantly contributing to downwind air quality problems or interfering with certain regulatory provisions in downwind states. Section 126 establishes a procedure for a state, or political subdivision, to petition the EPA to take federal action to address transported emissions from an identified source or group of sources in another state. The two provisions are independent, and nothing in the statute suggests that one is intended to limit the other.

In general, statutes are to be interpreted in a way that gives meaning to each section. The EPA's interpretation of section 126 is consistent with this general rule in that it gives section 126 a purpose independent of the other remedies available under the CAA. In contrast, if section 126 were interpreted as referring only to a prohibition contained in a SIP, the section would not have any practical utility in the statutory scheme. The EPA's interpretation of the relationship between sections 126 and 110 is supported by the legislative history of the amendments to the CAA which added section 126. In adopting the section 126 remedies, Congress explained that the petition process was intended to provide an avenue for relief separate from the 110(a)(2)(D) SIP procedure and that it was intended to expedite, not delay, resolution of interstate pollution conflicts.

The EPA's interpretation of the ''prohibition'' referred to in section 126 is also consistent with the language of section 110(a)(2)(D)(ii), which requires states to include in their SIPs provisions necessary to ensure compliance with sections 126 and 115 of the CAA, which relate to interstate transport and international transport of pollution, respectively. States are required to submit to the EPA such SIPs no later than 3 years after promulgation of a new or revised NAAQS. 42 U.S.C. 7410(a)(1). Thus, pursuant to section 110(a)(2)(D)(ii), any emission limits and compliance schedules issued by the Administrator under section 126 prior to that deadline must be incorporated into the section 110(a)(2)(D) SIP submission for the state in which a source subject to such limits is located. Accordingly, the statute anticipates that the Administrator may address a section 126 petition prior to the deadline for the initial submission of a section 110(a)(2)(D) SIP.

If Congress had intended to limit the EPA's authority to act on section 126 petitions until after the deadline for states to submit 110(a)(2)(D) SIPs, it could have included such a restriction. However, the plain language of the statute does not clearly require this interpretation. Rather, the statute requires the EPA to address a section 126 petition within 60 days after receipt.[3] Since the statute establishes firm deadlines for action on section 126 petitions, it does not provide an exception for petitions submitted prior to the good neighbor SIP submission deadline, and it provides a mechanism for incorporating reductions required in response to section 126 petitions into the state SIPs; the EPA believes it does not have discretion to delay action on a section 126 petition just because the state SIP submission deadline has not yet passed.

The EPA's interpretation of sections 110 and 126 in this context is also reasonable as it is consistent with the EPA's interpretation of these sections in two rulemakings issued in May 1999 and January 2000 which concluded that each section of the Act provides an alternative avenue for relief. Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport, 64 FR 28250 (May 25, 1999); Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport, 65 FR 2674 (Jan. 18, 2000). NJDEP has, in this case, sought relief via section 126 from the interstate transport of pollution that is significantly

[3] This deadline can be extended by up to 6 months pursuant to section 307(d)(10).

contributing to nonattainment within the state, and the EPA is obligated to address NJDEP's petition pursuant to the requirements of the Act.

B. Summary of Comments and Responses Regarding Legal Authority

Comment: Several commenters argue that the statutory text is unambiguous in requiring that states be permitted to submit their infrastructure SIPs addressing the transport requirements of section 110(a)(2)(D) before a section 126 petition can be filed.

The commenters primarily argue that this interpretation is compelled because a section 126 petition may only be filed to complain of a violation of a section 110(a)(2)(D) SIP where a state has failed to adequately enforce its own plan. Accordingly, the commenters argue that there is no prohibition of transport emissions absent an approved SIP. The operative language in section 126 is that a petition may be granted where there is ''a violation of the prohibition of'' section 110(a)(2)(D)(i). The commenters argue that ''prohibition'' referred to in section 126 is not on the act of emitting or contributing to transboundary nonattainment. Rather, the commenters assert, the prohibition is against emitting at levels that violate the limits imposed by the SIP regulations promulgated in response to the requirements of the CAA.

Some of these commenters also suggest that a section 126 petition would be justified where a state fails to meet its SIP revision obligations under section 110(a)(2)(D). These commenters therefore argue that a section 126 petition may not be filed until the state fails to meet its deadline to file a SIP addressing its transport obligations with respect to the new or revised NAAQS.

Response: The EPA does not agree that the interpretation posited by the commenters is reasonable much less compelled by the statutory text. Nothing in the statutory language in section 126 prohibits a downwind state from filing a section 126 petition until after the upwind state, in which the source or sources are located, has submitted, or is required to submit, a section 110(a)(2)(D) SIP to the EPA for approval. The commenters have not identified any statutory provision that so limits a downwind state's rights. Rather, the right of a state to file a section 126 petition does not have any time limitation, and the EPA is required to act quickly whenever presented with such a petition. The commenters' arguments that a section 126 petition cannot be filed, or a section 126 finding cannot be made, before the 110(a)(2)(D) SIP submission deadline passes are policy arguments with no basis in the statutory text. Instead, as discussed below, the statutory text, the structure of the CAA, and the legislative history all support the EPA's interpretation of the Act as creating, in sections 110 and 126, two independent means of controlling transboundary emissions and find no support for the argument that one should be prioritized over the other.

Moreover, the plain language of the statute does not clearly define ''prohibition'' to mean a SIP provision that sets emissions limits to address transboundary air pollution. Rather, the EPA believes that the better interpretation, in light of the structure of the CAA and its legislative history, is that the ''prohibition'' referred to in section 126 is the actual, functional prohibition on transboundary air pollution contained in section 110(a)(2)(D)(i).

The commenters' interpretation of the ''prohibition'' referred to in section 126 would render the relief provided by a section 126 petition process essentially meaningless. If a source is emitting in violation of an emission limitation in a SIP, there is no question that the source is in violation of the SIP. The language in section 126 stating that ''it shall be a violation of * * * the applicable implementation plan'' for a source to emit in violation of the prohibition of section 110(a)(2)(D) serves no legal purpose where the source is already directly violating a SIP requirement. By contrast, under the EPA's interpretation, section 126 deems a source's emissions to be a violation of the applicable SIP (as well as of section 126) whenever the emissions significantly contribute to nonattainment downwind or interferes with maintenance of any NAAQS. This interpretation gives legal effect to the language in section 126 and is consistent with Congress' purpose of providing a tool for downwind states and the EPA to use to impel upwind sources to reduce transported emissions even where a SIP may not yet directly regulate such emissions.

Moreover, the EPA's interpretation of section 126 gives it a purpose independent of the other remedies available under the CAA. Under section 113, upon finding that any person is in violation of any requirement of an approved SIP, the EPA has the authority to enforce the requirement by issuing an order to comply, issuing an administrative penalty order, or bringing a civil action. In addition, any person (which includes states) may bring a citizen suit against any person in violation of any requirement of an approved SIP, independent of the EPA action. Section 304(a), (f); *see also* section 302. These provisions provide more direct and likely quicker recourse against a source that is violating its SIP-imposed emission limits than the section 126 petition process would. Thus, there is no need to have a petition, public hearing, and EPA determination pursuant to section 126 simply to enforce existing SIP limits. By contrast, using the section 126 petition process where transboundary emissions are not yet being controlled by an upwind state serves the unique role of allowing a downwind state to force the EPA's consideration of the problem and potentially achieve emissions reductions directly from sources, without the need to depend on action by the upwind state.

The EPA's interpretation of the relationship between sections 126 and 110 is expressly supported by the legislative history of the CAA. In adopting the section 126 remedies, Congress explained that the petition process was intended to provide an avenue for relief separate from the section 110(a)(2)(D) SIP procedure:

> This petition process is intended to expedite, not delay, resolution of interstate pollution conflicts. Thus, it should not be viewed as an administrative remedy which must be exhausted prior to bringing suit under section 304 of the act. Rather, the committee intends to create a second and entirely alternative method and basis for preventing and abating interstate pollution. The existing provision prohibiting any stationary source from causing or contributing to air pollution which interferes with timely attainment or maintenance or [sic] a national ambient air standard (or a prevention of significant deteriorating [sic] or visibility protection plan) in another state is retained. A new provision prohibiting any source from emitting any pollutant after the Administrator has made the requisite finding and granted the petition is an independent basis for controlling interstate air pollution.

H. Rep. 95–294 at 305, reprinted in 1977 Legislative History at 2798. Nothing in the legislative history suggests, as the commenters assert, that the section 126 remedy is dependent on the section 110 SIP procedure. Rather, this language clearly indicates that Congress intended sections 110 and 126 to operate as independent means of controlling transboundary emissions and that it did not intend to prioritize one means of control over the other. Accordingly, there is no basis in the legislative history to support the commenters' argument that a state does not have the right to submit a section 126 petition until after the deadline to submit a section 110(a)(2)(D) SIP has passed. To the contrary, the legislative history supports the conclusion that Congress did not intend to impose any limitation

tied to the section 110(a)(2)(D) SIP procedure on when a state may submit a section 126 petition after a new or revised NAAQS is promulgated.

Moreover, Congress recognized in adopting all of the interstate transport provisions in the CAA that the interstate pollution problem stems from inadequate limits on transported emissions, and not inadequate compliance with adequate SIP requirements. This characterization of the problem is supported by the numerous descriptions of the interstate pollution problem in the 1977 legislative histories, all of which explicitly or implicitly refer to the lack of upwind limitations and none of which mentions sources' violation of upwind SIP limits. *See, e.g,.* S. Comm. on Envt. and Public Works, Clean Air Act Amendments of 1977, S. Rep. 95–127, 95th Cong., 1st Sess. 41 (1977), reprinted in 3 1977 Legislative History at 1415 (noting that the 1970 Act failed to specify any abatement procedure if a source in one state emitted air pollutants that adversely affected another state, and ''[a]s a result, no interstate enforcement actions have taken place, resulting in serious inequities among several States, where one State may have more stringent implementation plan requirements than another state''); H. Rep. 95–294, 95th Cong., 1st Sess. at 304 (1977), reprinted in 4 1977 Legislative History at 2798 (''[A]n effective program must not rely on prevention or abatement action by the State in which the source of the pollution is located, but rather by the state (or residents of the State) which receives the pollution and the harm, and thus which has the incentive and need to act.''). It is reasonable to assume that Congress intended to create a tool that would attack the problem Congress recognized. This supports the conclusion that Congress intended section 126 to provide an alternate means to compel compliance with the prohibition in section 110(a)(2)(D) where upwind states are not controlling transboundary emissions, and not where sources are violating adequate SIP provisions.

The interpretation that the EPA adopts here is also consistent with its historical interpretation of section 126. The EPA previously interpreted this section in two rulemakings issued in 1999 and 2000, wherein commenters challenged the EPA's authority, in light of a pending SIP call, to grant a number of section 126 petitions that sought to mitigate the transport of nitrogen oxides (NO_X) from downwind states that were significantly contributing to ozone nonattainment problems in the petitioning states. 64 FR 28250; 65 FR 2674. In both rulemakings, the EPA interpreted the relationship between sections 110 and 126 consistent with the EPA's interpretation here, concluding that the ''prohibition'' referred to in section 126 is the functional prohibition of section 110(a)(2)(D)(i), as opposed to an emissions limitation contained in a state's SIP, and that the section 110(a)(2)(D) SIP process and the section 126 petition process are independent and alternative means of addressing impermissible interstate transport.

Both rulemakings were challenged in the DC Circuit in *Appalachian Power Co.* v. *EPA,* 49 F.3d 1032 (2001), on the theories that the agency was required to refrain from making any section 126 findings while the SIP call was ongoing and that the doctrine of ''cooperative federalism'' embodied in the Act imposed a constraint on the EPA's ability to act before the section 110 process was complete. *Id* at 1045. The court deferred to the EPA's interpretation of the relationship between sections 110 and 126, holding that there is no inherent conflict in acting on a section 126 petition during the same period that a state has to develop a SIP submission: ''It is entirely reasonable for the EPA to regard a state that is under a legal obligation to revise its plan as being, in the meantime, in violation of a functional prohibition.'' *Id.* at 1046. The court explained that the petitioners' interpretation of section 126 would compromise three critical provisions of section 126:

1. The requirement that source operate no more than 3 years after finding of contribution to downwind nonattainment;

2. The fact that ''relief does not depend upon any action by the upwind states, as is necessary for a SIP revision''; and

3. The fact that relief under section 126 is independent of the discretionary policy preferences of the EPA, as the agency is required to act upon a petition within 60 days.

Id. The court noted that the EPA's interpretation retains all three aspects of the statutory requirements. *Id.* The court therefore concluded that ''[b]ecause it is reasonable, and because the 'Congress provided both [§§ 110 and 126] without indicating any preference for one over the other,' * * * the EPA's conclusion that these two provisions operate independently merits our deference under *Chevron* step two.'' *Id.* at 1048 (quoting 65 FR at 2680/1).

Thus, the EPA believes that the commenters' interpretation of section 126 is unreasonable and inconsistent with the legislative history, the EPA's past interpretations, and court rulings upholding those interpretations. In particular, the commenters' interpretation would render the relief provided by the section 126 petition process duplicative and unnecessary. The EPA's interpretation, on the other hand, gives legal effect to the language in section 126 and is consistent with Congress' purpose of providing an independent tool for a downwind states and the EPA to use to impel upwind sources to reduce transported emissions. The EPA believes this matter is clearly resolved by reference to the terms of the provision itself, so that under the first step of the *Chevron* analysis, no further inquiry is needed. If, however, it were concluded that the provision is ambiguous on this point, the EPA believes that, under the second step in the *Chevron* analysis, then the EPA should be given deference for any reasonable interpretation, as courts have given with respect to prior interpretations of section 126. Interpreting section 126 to refer to a functional prohibition on emissions and to preserve a state's right to file a section 126 petition is reasonable for the reasons described above.

Comment: Several commenters argue that the EPA is turning to section 126 as a ''first resort'' for implementing the new NAAQS and that we are substituting the EPA's judgment for Pennsylvania's regarding the appropriate control strategy for Portland. The commenters contend that revising Pennsylvania's SIP is a usurpation of state discretion and that the SIP process would be superfluous if we allowed petitions to be filed so close on the heels of new or revised NAAQS. The commenters believe that Congress intended states to have primary responsibility for implementing a new or revised NAAQS. They contend that the EPA's interpretation of section 126 places priority on interstate transport over intrastate control of NAAQS attainment.

Response: We respond by noting that the upwind state still retains its obligation to develop a SIP and implement the NAAQS. Applying section 126 independent of an upwind state's failure to act under section 110(a)(2)(D) does not impermissibly pressure upwind states to select certain control measures. The EPA acknowledges that because the section 126 findings precede any required state action, when states are eventually required to submit SIPs to control interstate transport, one of the largest sources of emissions will already be subject to emission control

requirements, and, depending upon the timing, may have already invested in controls. Yet this is not a legal constraint on states' choices—it is the reality that, over time, conditions change and different policy choices become more or less attractive for a variety of reasons. States would still be able to choose to regulate other sources, but depending upon the timing, the option of obtaining emission reductions from sources that have already invested in emission controls or have already reduced emissions may be more attractive on policy and economic grounds than regulating those sources otherwise would have been. There is a vast difference between, on one hand, the EPA prescribing a particular emissions control choice that states must adopt, and on the other, taking action required under the CAA to regulate sources directly with the possible effect of making certain future emissions control choices by some states more or less appealing.

Such a potential future effect on the regulatory environment cannot override the obligation that the EPA act on state petitions under section 126. We do not believe it would be reasonable to conclude that the EPA can take no action under an independent mandate of the statute to respond to petitions submitted by downwind states facing their own time constraints and pressures to meet air quality standards, just to preserve the relative attractiveness of a variety of options for control of SO_2 in the upwind states required under another provision of the CAA. The cooperative federalism principles of the CAA do not require the EPA to withhold federal action under section 126 until states have been required to and failed to submit SIPs. It is perfectly reasonable for Congress to have established section 126 as an alternative mechanism under the CAA to address the interstate pollution problem, just as it did again in adopting sections 176A and 184. To provide alternatives, the various interstate transport provisions are necessarily different from each other and from other provisions of the Act, but that does not make them inconsistent with other provisions of the Act. Thus, simply because the EPA will have imposed certain requirements on Portland does not mean that Pennsylvania no longer has any discretion in crafting its SIP submission with respect to NAAQS compliance anywhere in the state. Pennsylvania can take into consideration the controls that Portland chooses to implement when creating its own attainment plan, just as it would take into consideration controls implemented at any other source.

The court in *Appalachian Power Co.* v. *EPA* specifically addressed this concern that action on the section 126 petition before the SIP submissions were due would restrict the states' discretion to fashion their own plan for complying with the NAAQS: ''SIP development, like any environmental planning process, commonly involves decisionmaking subject to various legal constraints. That § 126 imposes one such limitation—and it is surely not the only independent provision of federal law to do so—does not affect a state's discretion under § 110.'' 49 F.3d at 1047.

Finally, as explained in detail above, Congress intended sections 110 and 126 to operate as independent and alternate means to address transboundary pollution, and indicated no preference for one means of compelling compliance over the other. Thus, the EPA's action on this section 126 petition does not prioritize the control of interstate pollution over a state's control of intrastate pollution. Rather, it gives legal effect to section 126, consistent with the structure of the CAA and the legislative history, by providing a tool for downwind states to use to impel upwind sources to reduce transported emissions.

IV. Summary and Assessment of the Modeling and Other Data Relevant to the EPA's Proposed Finding

A. Summary of the Modeling for the Proposed Rule

NJDEP's section 126 petition contained dispersion modeling results, based on both the CALPUFF [4] and AERMOD dispersion models, that NJDEP relied upon to show that emissions from Portland, alone, caused downwind violations of the 1-hour SO_2 NAAQS in New Jersey. Given the magnitude of the modeling violations, which were nearly seven times the 1-hour SO_2 NAAQS based on AERMOD modeling of maximum allowable emissions, and the fact that significant exceedances of the NAAQS were also shown based on modeling of estimated actual emissions, the EPA concluded that the NJDEP had clearly shown that SO_2 emissions from Portland cause violations of the 1-hour SO_2 NAAQS in New Jersey.

The EPA also modeled the emissions from Portland using the AERMOD dispersion model and determined that the modeled concentrations from Portland, when combined with the relatively low background concentrations, cause violations of the 1-hour SO_2 NAAQS in Morris, Sussex, Warren and Hunterdon Counties in New Jersey.[5] This section discusses the key modeling issues that arise in making that determination, and how the EPA is responding to comments we received on those issues. We also note that this modeling is used not only to characterize the NAAQS violations, but, as discussed in section V, it is also used to determine the appropriate remedy to address such violations.

1. Modeling Analysis in NJDEP's Section 126 Petition

a. Model Selection

Model selection was one of the key issues that the EPA addressed in support of this rule given the critical role played by dispersion modeling both in relation to a finding under a section 126 petition that a source significantly contributes to nonattainment and/or interferes with maintenance of the 1-hour SO_2 NAAQS in a neighboring state, and in relation to the determination of an appropriate remedy to address such a finding. As summarized in the proposed rule and documented in more detail in the EPA's proposed rule Air Quality Modeling Technical Support Document, NJDEP included modeling results based on both the CALPUFF and AERMOD dispersion models with its section 126 petition. The importance of this issue is further highlighted by the fact that the maximum 99th percentile of the daily maximum 1-hour modeled SO_2 concentrations based on CALPUFF was about 2.5 times higher than the maximum 99th percentile of the daily maximum 1-hour modeled concentrations based on AERMOD. Consequently, a much more stringent remedy would be required to address such a finding based on CALPUFF modeling than based on AERMOD modeling.

The NJDEP acknowledged that AERMOD is the preferred model under the EPA's ''Guideline on Air Quality Models,'' published as Appendix W to 40 Code of Federal Regulations (CFR) Part 51, for near-field applications such as this, but suggested that the use of CALPUFF may be appropriate under the alternative model provisions in Section 3.2.2b of Appendix W. Section 3.2 of Appendix W lists three separate conditions under which an alternative model may be approved for use:

[4] CALPUFF is a non-steady-state puff dispersion model that was originally developed for the California Air Resources Board.

[5] The EPA modeling analysis is detailed in the proposed rule Air Quality Modeling Technical Support Document, available in Docket ID EPA–HQ–OAR–2011–0081–0026.

(1) If a demonstration can be made that the model produces concentration estimates equivalent to the estimates obtained using a preferred model;

(2) If a statistical performance evaluation has been conducted using measured air quality data and the results of that evaluation indicate the alternative model performs better for the given application than a comparable model in Appendix A of Appendix W; or

(3) If the preferred model is less appropriate for the specific application, or there is no preferred model.

The NJDEP modeling documentation suggested that NJDEP's use of the CALPUFF model in support of this petition was based on condition (2) of Section 3.2.2b, claiming to have shown that CALPUFF ''performed better and produced predictions of greater accuracy than AERMOD'' for this application. NJDEP also claimed that the use of CALPUFF is more appropriate for this specific application due to the complex winds addressed in Section 7.2.8 of Appendix W and is therefore justified under condition (3) of Section 3.2.2b.

The section 126 petition referenced a CALPUFF model validation study based on the Martin's Creek field study database, submitted by NJDEP with an earlier section 126 petition, as demonstrating that ''CALPUFF performed better and produced predictions of greater accuracy than AERMOD'' for this application.[6]

At proposal, the EPA included a detailed assessment of the NJDEP CALPUFF validation study as Appendix A of the proposed rule Air Quality Modeling TSD, and concluded that NJDEP had not adequately justified the use of CALPUFF in this application under either conditions (2) or (3) of Section 3.2.2b of Appendix W. The EPA further asserted that AERMOD is the most appropriate model for this application. Our assessment of the CALPUFF validation study identified several aspects of NJDEP's validation methodology that deviated from the EPA's Protocol for Determining the Best Performing Model,[7] which undermined the integrity of the evaluation results. In addition, we cited the ''weight of evidence'' regarding AERMOD model performance which is based on evaluations for a total of 17 field study databases as compared to NJDEP's CALPUFF validation study which is the only near-field evaluation of CALPUFF model performance that the EPA is aware of that included CALMET-generated 3-dimensional wind fields. We also pointed to the fact that the 1-hour, 3-hour and 24-hour quantile-quantile (Q–Q) plots of modeled versus observed concentrations for AERMOD and CALPUFF included in the NJDEP validation study suggested that the performance of the CALPUFF and AERMOD models was very similar for this database, with both models exhibiting generally good agreement with observations, but with AERMOD showing slightly better overall agreement than CALPUFF. These clear visual comparisons of model performance are difficult to reconcile with NJDEP's assertion that CALPUFF performed better than AERMOD.

b. Meteorological Data

Another key component of the dispersion modeling analysis is the meteorological data. The EPA based the AERMOD modeling in support of the proposed rule on 1 year of Portland site-specific meteorological data available for July 1993 through June 1994. The site-specific meteorological data were collected from a 100-meter instrumented tower and Sound Detection and Ranging instrument (SODAR), located about 2.2 kilometers west of Portland. Based on a review of the data, we determined that the Portland meteorological data from 1993–94 meet the basic criteria for representativeness under Section 8.3.3 of Appendix W, and therefore can be considered as site-specific data for purposes of modeling impacts from the elevated stacks for Portland units 1 and 2. The 1993–94 data also meet the minimum criterion for the length of meteorological data record of at least 1 year of site-specific meteorological data recommended in Section 8.3.1.2 of Appendix W. However, the difference of about 100 meters in the base elevation for the meteorological tower versus the stack base elevation raised concerns regarding how the meteorological data were input to the AERMOD model in the NJDEP modeling analysis given that the stack heights for units 1 and 2 are about 122 meters and that plume heights of concern for units 1 and 2 are about 200 to 400 meters above stack base.

The AERMOD modeling submitted by NJDEP used the measurement heights above local ground at the tower location for the meteorological data input to the model, effectively assuming that the measured profiles of wind, temperature and turbulence are ''terrain-following.'' Without adjusting for the difference in base elevation of about 100 meters between the meteorological data and the stacks, wind speeds are likely to be biased high and the wind directions may not be representative of plume heights relative to stack base. A review of the raw meteorological data files for Portland also revealed the fact that σ_w (vertical turbulence) data were available from the SODAR, but had not been used in the AERMOD modeling submitted with NJDEP's section 126 petition. Based on the analyses that are described in more detail in the EPA proposed rule Air Quality Modeling TSD, the EPA concluded that the representativeness of the Portland meteorological data would be improved by incorporating some adjustments to the measurement heights from the SODAR data and the inclusion of the σ_w data collected from the SODAR.

2. The EPA's Modeling Analysis To Quantify Significant Contribution

In the EPA AERMOD modeling analysis, thousands of receptors were placed in New Jersey to determine the area of maximum concentration from Portland's emissions in order to quantify Portland's significant contribution to nonattainment in New Jersey. A design value concentration was calculated for each receptor for comparison to the NAAQS. The design value concentration is equal to the 99th percentile (4th-highest) of the annual distribution of daily maximum 1-hour SO_2 concentrations. All receptors with modeled design value concentrations that are greater than the NAAQS [196.2 micrograms per cubic meter (ug/m^3)] [8] are determined to be nonattainment receptors.

The EPA proposed to define Portland's significant contribution to nonattainment and interference with maintenance as those emissions that must be eliminated to bring the downwind receptors in New Jersey affected by Portland into modeled attainment in the analysis year. While this approach would not be appropriate in every circumstance, the EPA believes it is appropriate where, as here, the source's emissions are sufficient on their own to cause downwind NAAQS violations and background levels of the relevant pollutant are relatively low. The EPA therefore developed a

[6] *See* Letter from Bob Martin, Commissioner, New Jersey Department of Environmental Protection (NJDEP) to Lisa P. Jackson, Administrator, USEPA (September 13, 2010), Section IV, page 5. Docket ID No. EPA Docket, EPA–HQ–OAR–2011–0081–009.

[7] Protocol for Determining the Best Performing Model. EPA–454/R–92–025 (1992). U.S. Environmental Protection Agency, Research Triangle Park, NC, available at: *http://www.epa.gov/ttn/scram/guidance/guide/modleval.zip.*

[8] The 1-hour SO_2 NAAQS is 75 ppb. For comparison to dispersion modeling results in units of ug/m^3, the NAAQS can be expressed as 196.2 ug/m^3, assuming reference temperature and pressure.

methodology to identify the reductions necessary to bring the downwind receptors into attainment.

To quantify the emissions that constitute Portland's significant contribution, the EPA identified the level of emissions that need to be reduced to ensure that no modeled concentration within the affected area (in New Jersey) exceeds the level of the NAAQS (*i.e.,* the 99th percentile of the daily maximum 1-hour average of 196.2 ug/m^3).

The EPA also analyzed the modeling results to determine the appropriate emissions reductions that were needed to eliminate ''interfere with maintenance.'' In addition to nonattainment receptors, the EPA also attempted to identify receptors that are modeled to be attainment but due to variability in meteorology or emissions might be at risk for nonattainment. Due to the high modeled concentrations from Portland's emissions, all of the downwind modeled receptors in the final modeled receptor grid in New Jersey are modeled to be nonattainment. In this application, it was not necessary to expand the modeling grid to identify additional nonattainment or ''maintenance only'' receptors because the modeling domain was focused on the receptors with the maximum impact from Portland. Therefore, the EPA did not identify any ''maintenance only'' receptors.

In the proposal, the EPA considered whether Portland should be required to make additional reductions, above and beyond those required to eliminate its significant contribution to nonattainment, to ensure that it does not interfere with maintenance of the 1-hour SO_2 NAAQS in violation of the prohibition in section 110(a)(2)(D). We identified an approach that we believe is appropriate for these specific circumstances. Among other things, we considered the nature of the modeling used to determine the appropriate remedy and the potential for actual SO_2 concentrations in New Jersey to be higher than those modeled. In the proposal, the EPA determined there is no indication that concentrations higher than those modeled from Portland would be likely to occur at nonattainment and/or maintenance receptors or anywhere else in New Jersey. This was based on the following facts:

1. There is only 1 year of site-specific meteorology available, such that we were not able to explicitly examine the impact of year-to-year variability of meteorology on downwind modeled concentrations.[9]

2. The remedy modeling used maximum allowable emissions from Portland. Since these are the highest emissions that are allowed to be emitted by the facility, higher concentrations could not be expected to occur in New Jersey due to the variability of emission from Portland.

3. In the modeling analysis, we used background concentrations that varied by season and hour of day based on the 3-year average of the 99th percentile of the distribution of hourly SO_2 concentrations in the area, which represents the high end of the distribution of monitored background concentrations. The background concentration accounts for contributions from other SO_2 sources. As demonstrated by NJDEP's trajectory analysis,[10] it is likely that SO_2 impacts from Portland contributed to some of the high monitored concentrations at the Chester, New Jersey, monitor used to represent the background concentrations, which is located about 34 kilometers east-southeast of Portland. Although use of the 99th percentile values by season and hour of day from the Chester, New Jersey, monitor eliminated some of the peak hourly SO_2 concentrations, the background concentrations are still likely to be somewhat conservative (high) to account for variability that otherwise cannot be quantified.

It was therefore reasonable to conclude, under the circumstances, that any remedy that eliminates the significant contribution to nonattainment from Portland also eliminates its interference with maintenance with respect to year-to-year variability in emissions and meteorology. The EPA therefore proposed to find that compliance by Portland with the proposed emission limits will bring it into compliance with the prohibition on emissions that significantly contribute to nonattainment of the 1-hour SO_2 NAAQS as well as with the prohibition on emissions that interfere with maintenance in a downwind area. The EPA requested comments on our modeling methodology and meteorological data adjustments.

B. Public Comments Related to the Modeling

We received many public comments related to the modeling that was used to support the finding that SO_2 emissions from Portland contribute significantly to nonattainment and interfere with maintenance of the 1-hour SO_2 NAAQS in New Jersey. Some of the main comments and the EPA's responses related to model selection, meteorological data, emissions and source characteristics, and background concentrations are summarized below, with further details provided in the Response to Comments document.

1. Model Selection

Comments: We received several comments supporting the EPA's conclusion that AERMOD is the appropriate dispersion model for this petition, and that also supported the EPA's overall assessment that NJDEP's CALPUFF validation study failed to demonstrate that CALPUFF performs better for this application than AERMOD. One commenter (NJDEP) believes that the modeling in support of the section 126 petition should be based on CALPUFF, and provided detailed comments on the EPA assessment of the CALPUFF validation study.

Response: As discussed in greater detail in the final rule Air Quality Modeling technical support document (final rule Modeling TSD), the EPA review of NJDEP's comments related to our assessment of the CALPUFF validation study has identified additional deficiencies with the study that further undermine NJDEP's conclusion that ''CALPUFF performed better and produced predictions of greater accuracy than AERMOD'' for this application. One of these deficiencies that came to light upon closer examination of the CALPUFF modeling files for the validation study is that NJDEP used the ''ISC Type'' option for building downwash in CALPUFF instead of the PRIME [11] downwash option when applying CALPUFF for the Martin's Creek validation study, although the CALPUFF input file

[9] Due to constraints on data availability, our analysis is appropriate in this instance; however, nothing here is intended to suggest that, where sufficient data are available to examine year-to-year variability, this should not be a relevant factor.

[10] *See* Trajectory Analysis of High Sulfur Dioxide Episodes at the Chester, NJ Monitor. Bureau of Technical Services, Division of Air Quality, New Jersey Department of Environmental Protection. July 30, 2010. Submitted to USEPA as Exhibit 4 of the September 13, 2010 Supplement to New Jersey's May 12, 2010 Petition Pursuant to Section 126 of the Clean Air Act, 42 U.S.C. 7426. Docket ID No. EPA Docket, EPA–HQ–OAR–2011–0081–008.

[11] The ''ISC Type'' building downwash option in CALPUFF refers to the Huber-Snyder and Schulman-Scire algorithms that are incorporated in the Industrial Source Complex Short Term (ISCST3) model. The PRIME downwash option refers to the ''Plume Rise Model Enhancements'' algorithms that were initially incorporated into a revised version of ISCST3 called ISC–PRIME, and were later incorporated into the AERMOD model prior to its promulgation as the EPA-preferred model for near-field applications, replacing ISCST3, in 2005.

included the necessary building input parameters to run the PRIME option. The AERMOD modeling results for Martin's Creek used for comparison were based on the PRIME downwash algorithm. While building downwash associated with the cooling towers at Martin's Creek exhibited only a modest influence on results based on AERMOD evaluations, it is important enough to be treated properly in the model evaluation, and the EPA concludes that the PRIME downwash option should have been used in the CALPUFF modeling since AERMOD's promulgation effectively established the PRIME algorithm as the ''preferred'' downwash algorithm for near-field applications. NJDEP's CALPUFF validation report identifies that the ''ISC type'' downwash option was used in the table of CALPUFF inputs (the MBDW parameter in Table 8.2), but provides no explanation or justification for not using the PRIME downwash option. As described in more detail in the final rule Modeling TSD, the inclusion of the PRIME downwash option in CALPUFF resulted in a greater tendency for CALPUFF to overestimate concentrations at Martin's Creek as compared to the ''ISC–Type'' downwash option, with some deterioration in model performance metrics.

Additional evidence supporting the EPA's determination that AERMOD is a more appropriate model for this application than CALPUFF was provided by an EPA analysis of high modeled SO_2 concentrations versus high observed SO_2 concentrations at the Columbia Lake Wildlife Management (Columbia) air quality monitor located in New Jersey about 2 kilometers northeast of Portland. The EPA compared the observed SO_2 data from September 2010 through September 2011 to modeled concentrations from AERMOD and CALPUFF. Although the monitored concentrations are based on a different period than the modeled concentrations (1993–94 in the case of AERMOD, and 1992–93, and 2002 for CALPUFF), it is reasonable to expect some degree of comparability between modeled and monitored concentrations based on the upper end of the ranked concentration distributions. These comparisons, which were patterned after comparisons presented in NJDEP's trajectory analysis report for the Columbia monitor [12] and are described in more detail in the final rule Modeling TSD, show generally good agreement with observations based on AERMOD modeling, utilizing the EPA's adjustments [13] to the 1993–94 site specific meteorological data for Portland. The EPA analysis used an emission scenario of 100 percent load and 70 percent of allowable emissions for Portland units 1 and 2, which is representative of peak operating conditions for Portland during the period of monitoring data and reflects the fact that the sulfur content of the fuel being burned at Portland was typically about 70 percent of the allowable sulfur content. Since Portland frequently operates well below these levels, we would expect to see some bias toward overestimation in the modeled concentrations, and the AERMOD predictions are consistent with that expectation. The average ratio of predicted to observed concentrations for the top 10 daily maximum 1-hour values was 1.14. By comparison, the average predicted/observed ratio for AERMOD for the same emission scenario using NJDEP's meteorological data for Portland without the EPA's adjustments was 0.77. The modeled concentrations are based on both units 1 and 2 operating at 100 percent load and 70 percent of allowable emissions, without any contribution from background concentrations. The relatively good model performance for AERMOD is in contrast to a large over-prediction when CALPUFF results are compared to observed SO_2 at the Columbia monitor. The average predicted/observed ratios for CALPUFF were about 3.26 for the 1992–93 meteorological data and 3.87 for the 2002 meteorological data. Additional details regarding these analyses related to the Columbia monitoring data are provided in the EPA final rule Modeling TSD.

2. Meteorological Data

Comments: GenOn submitted comments indicating general agreement with the EPA adjustments to the Portland meteorological data, although it recommended also including the turbulence data from the 30-meter level on the instrumented tower, including both σ_w and σ_θ (lateral turbulence), which had been excluded from the EPA modeling in support of the proposal.

Response: We disagree with GenOn's recommendation to include the 30-meter turbulence data due to the concerns regarding the representativeness of such data, which are documented in the proposed rule Air Quality Modeling TSD. The EPA explained that it excluded the 30-meter turbulence data due to concerns regarding the representativeness of the data at that level relative to stack base elevation given that the measurement heights from the 100-meter tower were not adjusted and would therefore be treated as being representative of meteorological conditions within the valley.

We also note that inclusion of the 30-meter turbulence data would have a negligible effect on the modeling results since the elevated plumes from Portland units 1 and 2 will be well above 30 meters such that transport and dispersion of the plumes will be determined by measurements at higher levels from the tower and SODAR. Therefore, the 30-meter turbulence data is only expected to influence the plumes in the rare cases where turbulence data were missing from the 100-meter level on the tower and from the SODAR. Due to the representativeness issues, we believe it would be inappropriate to rely on the 30-meter turbulence data in those cases.

Comment: NJDEP submitted detailed comments opposing the EPA's adjustments to the Portland meteorological data, as well as other aspects of the meteorological data processing. NJDEP's opposition to the EPA adjustments to Portland meteorological data primarily concerned past precedents regarding prior modeling analyses based on the data, the lack of field study evaluation results validating the use of SODAR-derived σ_w data in AERMOD, and the fact that the net effect of the meteorological data adjustments incorporated in the EPA modeling reduced the overall modeled design value by about 40 percent as compared to the AERMOD modeling results submitted by NJDEP with the section 126 petition.

Response: Regarding the exclusion of SODAR-derived σ_w data in past analyses, we noted that the EPA meteorological monitoring guidance prior to 2000 discouraged the use of SODAR-derived turbulence data, including σ_w. However, we also note that the updated guidance issued by the EPA in 2000 [14] supports the use of SODAR-derived σ_w based on additional analyses of SODAR versus tower-based σ_w data. Furthermore, as mentioned

[12] Analysis of the Sulfur Dioxide Measurements from the Columbia Lake, NJ Monitor. Bureau of Technical Services, Division of Air Quality, New Jersey Department of Environmental Protection, March 4, 2011. Docket ID No. EPA–HQ–OAR–2011–0081–0019.

[13] As documented in Appendix B of the EPA proposed rule Air Quality Modeling TSD, the EPA adjusted some of the measurement heights from the SODAR data and also included the SODAR-derived σ_w data.

[14] Meteorological Monitoring Guidance for Regulatory Modeling Applications, EPA–454/R–99–005 (February 2000). U.S. Environmental Protection Agency, Research Triangle Park, NC, available at: *http://www.epa.gov/ttn/scram/guidance/met/mmgrma.pdf*

above in relation to the issue of model selection and as documented in more detailed in the final rule Modeling TSD, additional analyses based on model-to-monitor comparisons against the Columbia, New Jersey, ambient SO_2 data show much better agreement between modeled and monitored concentrations based on the EPA-adjusted meteorological data than for the unadjusted data used by NJDEP in its AERMOD modeling, which tends to corroborate the EPA adjustments to the meteorological data. As shown in NJDEP's trajectory analysis for the Columbia monitor (NJDEP, March 4, 2011) and further documented in the final rule Modeling TSD, AERMOD modeling based on the unadjusted data used by NJDEP exhibits a tendency to underestimate ambient concentrations as compared to the Columbia monitored data. Although these analyses lend some credence to the appropriateness of the EPA meteorological data adjustments, we believe that the adjustments are fully justified based on current EPA meteorological monitoring guidance as well as technical considerations, in relation to the approximately 100 meter difference between the base elevation of the meteorological tower/SODAR and the base elevation of the Portland stacks as documented in more detail in the EPA final rule Modeling TSD.

Regarding the fact that the maximum 99th percentile 1-hour SO_2 modeled design value based on the EPA analysis including adjustments to the meteorological data was about 40 percent lower than the maximum 99th percentile design value based on the NJDEP AERMOD modeling (1,402 ug/m^3 versus 851 ug/m^3), we also note that the EPA-modeled results are in fact higher than the NJDEP results across most of the final modeled domain. More specifically, the EPA modeled results are higher than the NJDEP results for about 96 percent of the modeled receptors in the final 100-meter receptor grid, and the average difference across all receptors was about 44 percent higher based on the EPA modeling.

Based on this review of comments submitted regarding the EPA adjustments to the Portland meteorological data and in light of additional evidence supporting the appropriateness of the adjustments based on model-to-monitor comparisons for the Columbia, New Jersey, ambient monitor, no changes relative to the proposal have been made to the meteorological data used in the EPA AERMOD modeling in support of this final action.

Comment: A few commenters raised concerns regarding the fact that the EPA AERMOD modeling relied upon a single year of site-specific meteorological data. One commenter suggested that a more conservative estimate of the modeled design value used compensated for this, such as the highest second-highest concentration rather than the 99th percentile of the annual distribution of the daily maximum 1-hour values. Similarly, another commenter suggested use of the highest possible concentration as being the most conservative value.

Response: These comments regarding the limitations in the amount of meteorological data used in support of the proposed rule relate to the issue of whether the Portland emissions may interfere with maintenance of the NAAQS due to variability of meteorological conditions.[15] Although we are not able to explicitly account for the impact of year-to-year variability of meteorology on downwind modeled concentrations, the form of the 1-hour SO_2 NAAQS based on the 99th percentile of the annual distribution of daily maximum 1-hour values, averaged across 3 years for monitoring data, is recognized as a more stable metric of ambient air quality that is less sensitive to meteorological variability than a deterministic standard that would be based on allowing one exceedance per year. For a deterministic standard, the inclusion of additional years of meteorological data can only increase the modeled design value or leave it unchanged, since the design value is the highest of the second-highest values across each of the individual years modeled. In contrast, the inclusion of additional years of meteorological data for a probabilistic standard such as the 1-hour SO_2 NAAQS may increase or decrease the modeled design value since it is averaged across the number of years modeled at each modeled receptor.

To further illustrate this point, the EPA performed an analysis of impacts from Portland based on 5 years of meteorological data from the Allentown National Weather Service (NWS) station for the period 2006 through 2010. This analysis shows that the range of variability between the individual year with the lowest modeled design value and the 5-year average modeled design value is about 6 percent. For comparison, using the same 5 years of meteorology data, the range of variability across the 5 years for a deterministic 1-hour standard was about 35 percent for the first highest 1-hour values and about 17 percent for the highest second-highest 1-hour values. More details regarding these analyses are provided in the final rule Modeling TSD.

We also note that variability in relation to interference with maintenance also encompasses variability in emissions. As noted above, the modeling conducted to determine the proposed remedy for Portland was based on maximum allowable emissions. Since these are the highest emissions that are allowed to be emitted by the facility, higher concentrations could not be expected to occur in New Jersey due to the variability of emissions from Portland. Furthermore, analysis of continuous emissions monitoring systems (CEMS) data for Portland indicates a much larger range of potential variability associated with emissions than was found for meteorological variability based on the analysis summarized above.

Regarding variability in relation to emissions from other sources of SO_2 that might overlap with impacts from Portland, we believe that we have adequately addressed this aspect of variability associated with emissions from existing sources through the inclusion of a relatively conservative monitored background concentration in the cumulative modeling analysis, as discussed in more below in section IV.B.4. Furthermore, background ambient concentrations of SO_2 due to existing sources are likely to decline from recent and current levels over the next several years in association with the development and promulgation of SIPs for the 1-hour SO_2 NAAQS as well as the recent finalization of the Cross State Air Pollution Rule (CSAPR), also known as the Transport Rule. We also note that potential variability, more specifically increases, in emissions from new or modified sources would be addressed through the new source review (NSR) and prevention of significant deterioration (PSD) permitting process associated with implementation of the 1-hour SO_2 NAAQS.

Based on these considerations and supporting analyses using 5 years of NWS meteorological data, the EPA believes that the modeled design value based on the form of the 1-hour SO_2 NAAQS is the appropriate metric for use in this final rule and that the proposed remedy will be adequate to address Portland's significant contribution to nonattainment and interference with maintenance of the 1-hour SO_2 NAAQS in New Jersey.

[15] The use of 1 year of site-specific meteorological data fulfills the requirements of Appendix W related modeling demonstrations of compliance with the NAAQS. The commenters are addressing the issue of interference with maintenance.

3. Emissions and Source Characteristics

Comment: GenOn commented that EPA's dispersion modeling used outdated stack parameters for units 1, 2, and 5 and submitted a list of revised parameters that it states should be used in the modeling.

Response: The EPA updated the stack parameters used in the final rule dispersion modeling, based on the submitted parameters from GenOn. The parameters include the stack heights, exit temperatures, exit velocities, and stack diameters. These updated stack parameters had a negligible effect on the modeled concentrations. *See* section IV.A for a table of the stack parameters used in the final rule modeling.

Comment: GenOn commented that interim and final SO_2 emissions limits should only be set for Portland units 1 and 2.

Response: The EPA agrees that interim and final SO_2 emissions are only needed for Portland units 1 and 2.

There were no comments supporting emissions limits for the smaller sources (units 3, 4, 5, and an auxiliary boiler) in the final rule. In fact, in both the original section 126 petition modeling and additional modeling submitted as comments on the proposal, NJDEP only included emissions from Portland units 1 and 2. In the final rule, the EPA is setting emissions limits for units 1 and 2 only.

4. Identification of Background Concentrations

As noted above in the summary of the EPA modeling for the proposed rule, and explained in more detail in the proposed rule Air Quality Modeling TSD, the EPA used background concentrations that varied by season and hour-of-day based on the 3-year average of the 99th percentile of the distribution of hourly SO_2 concentrations from the Chester, New Jersey, ambient monitor, located about 34 kilometers southeast of Portland, which represents the high end of the distribution of monitored background concentrations in the area.

Comment: GenOn submitted comments suggesting that the background concentrations used in the EPA modeling for the proposed rule based on the Chester, New Jersey, monitor were too high and likely included impacts from Portland emissions. GenOn also submitted revised background concentrations that were adjusted to remove hours for which Portland was potentially influencing the Chester, New Jersey, monitor, although GenOn did not provide any details regarding the methodology used for adjusting the monitored concentrations.

Response: As noted above in relation to comments on the meteorological data, incorporating background concentrations based on 3 years of monitoring data incorporates some elements of meteorological variability into the cumulative modeling demonstration, which further mitigates potential concerns regarding reliance on a single year of meteorological data in the dispersion modeling. Also, as demonstrated by NJDEP's trajectory analysis (NJDEP, July 30, 2010), we agree that it is likely that SO_2 impacts from Portland contributed to some of the high monitored concentrations at the Chester, New Jersey, monitor used to represent the background concentrations. Although use of the 99th percentile values by season and hour-of-day from the Chester monitor excluded some of the peak hourly SO_2 concentrations, the background concentrations are still likely to be somewhat conservative (high), but the EPA believes that this conservatism is appropriate in order to account for both meteorological variability that otherwise could not be explicitly accounted for, and low background levels from other sources that may contribute to ambient SO_2 levels in New Jersey. Furthermore, the differences between the background concentrations used in the EPA modeling analysis and the background concentrations submitted by GenOn were less than about 5 parts per billion (ppb) in most cases, and would have a negligible impact of about 0.5 percent on the remedy necessary to eliminate Portland's significant contribution to nonattainment and interference with maintenance of the 1-hour SO_2 NAAQS in New Jersey.

5. Columbia Monitor Data and Analyses

As noted in the proposal, the Columbia air quality monitor in Warren County, New Jersey, is located approximately 1.2 miles (about 2 kilometers) northeast of Portland. The Columbia monitor has recorded concentrations over the 75 ppb 1-hour SO_2 NAAQS.[16] *See* 76 FR 19662. Since the monitor began operation on September 23, 2010, it has recorded numerous exceedances of the 1-hour SO_2 NAAQS. We noted in the proposal that exceedances of the NAAQS occurred when prevailing winds in the area came from the direction of Portland, NJDEP submitted a document dated March 4, 2011 titled, ''Analysis of the Sulfur Dioxide Measurements from the Columbia Lake NJ Monitor which can be found in the docket, (*See* Docket ID EPA–HQ–OAR–2011–0081–0019). This document used wind trajectory analyses to find that Portland's units 1 and 2 were the likely cause of each high SO_2 episode at the monitor. We found these analyses to be consistent with our finding and modeling which predicts exceedances of the 1-hour SO_2 NAAQS in the vicinity of the Columbia monitor.

Comment: NJDEP submitted new SO_2 ambient data collected at the Columbia monitoring station located in Warren County, New Jersey. The monitor began collecting data on September 23, 2010, and measured exceedances of the 1-hour SO_2 NAAQS on 9 days through February 17, 2011. The NJDEP submitted a trajectory analysis which attempts to track the SO_2 emissions from Portland on days when exceedances were measured at the Columbia monitor. The NJDEP also submitted a new modeling analysis which attempted to model the impact of emissions from Portland at the Columbia monitor, using recent SO_2 CEMS emissions data from Portland and the Columbia ambient monitoring data. The NJDEP concludes that the monitoring data, trajectory analysis, and the modeling analysis support the EPA's proposed finding that Portland significantly contributes to nonattainment in New Jersey and is also consistent with the results of NJDEP's and the EPA's modeling analyses, showing a good correlation between the modeling analyses and monitoring data.

Response: The EPA agrees with many aspects of the analysis submitted by NJDEP. We agree that the trajectory analysis of the recent Columbia monitoring data supports the conclusion that the exceedances are primarily caused by emissions from Portland. The analysis shows that on the days examined, the winds are blowing from Portland towards the Columbia monitor, and the available CEMS data show large SO_2 emissions from Portland.[17]

The EPA also agrees that the modeling analysis submitted by NJDEP indicates good performance for AERMOD in representing the modeled concentrations at the Columbia monitor on the exceedance days in 2010. However, interpretation of the analysis is complicated by the fact that concurrent site-specific meteorology is not available during 2010 or 2011. The

[16] *See* ''Summary of 1–Hour SO_2 Monitoring Data from the Columbia Monitor in Warren County, New Jersey'' TSD available in the docket, available in Docket ID EPA–HQ–OAR–2011–0081–0005.

[17] The NJDEP analysis also includes CEMS data from the nearby Martins Creek power plant which shows little or no SO_2 emissions from Martins Creek on the exceedance days examined.

modeling analysis was therefore conducted with the 1993–1994 site-specific meteorology used for the proposed rule modeling which as noted above the EPA found to be a reasonable assumption. NJDEP used three different emissions assumptions in the modeling analysis. It concluded that AERMOD modeling based on allowable emissions gives the best agreement with monitored concentrations at Columbia. Since the CEMS data show that Portland was operating well below allowable emissions during many of these exceedances, NJDEP contends that this implies that AERMOD is underestimating the modeled concentrations at the Columbia monitor. The EPA disagrees with this conclusion. As shown above in our response to comments regarding the use of CALPUFF versus AERMOD, we believe that the manner in which NJDEP ran AERMOD for this analysis contributed to the model underestimating concentrations in the vicinity of the Columbia monitor. Specifically, the use of the Portland site-specific meteorological data without the adjustments incorporated in the EPA AERMOD modeling analysis contributes to underestimating impacts in the vicinity of the Columbia monitor. Further details regarding the EPA analysis of the Columbia monitor are contained in the final rule Modeling TSD.

C. Modeling and Other Analyses To Determine Significant Contribution for the Final Rule

The EPA continues to believe that the AERMOD modeling analysis provides a more appropriate technical basis for this petition than the modeling submitted based on the CALPUFF model, as explained in this notice and in more detail in the final rule Modeling TSD.

The EPA's review of the NJDEP AERMOD analysis supports a finding that SO_2 emissions contribute significantly to nonattainment and interfere with maintenance of the 1-hour SO_2 NAAQS. However, we noted some technical concerns with the NJDEP modeling which may affect the degree to which emissions need to be reduced to be able to meet the 1-hour SO_2 NAAQS in New Jersey. Therefore, the EPA conducted an independent modeling assessment to confirm the finding of significant contribution and to help determine the necessary and appropriate emission limits for Portland units 1 and 2 (the EPA modeling analysis is described in more detail in section V and the final rule Modeling TSD).

As part of the original petition, NJDEP also submitted a trajectory analysis of two particular episodes showing that elevated 1-hour SO_2 measurements at the Chester monitor in Morris County, New Jersey, were caused primarily by Portland. As described earlier, NJDEP also submitted an analysis (dated March 4, 2011) of recent SO_2 monitor data at the Columbia monitor in New Jersey, which includes a trajectory analysis for exceedance days [18] at the Columbia monitor and a modeling analysis of the impact of Portland SO_2 emissions on the Columbia monitor.

For the reasons discussed above, the EPA believes that the AERMOD analysis, submitted by NJDEP and modeled by the EPA, provides a reasonable basis for making a finding that emissions from Portland significantly contribute to nonattainment and interfere with maintenance in New Jersey and for quantifying the SO_2 emissions reductions needed to establish the final remedy emission limits. In addition, the trajectory analysis, monitoring data analysis, and the air quality monitoring data collected from the Columbia monitor in New Jersey are consistent with our finding of significant contribution to nonattainment and interference with maintenance of the 1-hour SO_2 NAAQS in New Jersey. Our analysis for determining the final emission limits are presented in the next section.

V. Establishing the Emission Limits Necessary for the Remedy

In the proposed rule, the EPA conducted analyses to determine the emissions limits that would be necessary to permit Portland's continued operation under our section 126 finding. This section summarizes these analyses and discusses the comments and responses on the analyses, and our use of the analyses to establish the final remedy. It also discusses the selection of the appropriate time frame for the final remedy, as well as other issues that commenters raised concerning the final remedy. Continued operation of a major existing source subject to a section 126 finding is permitted only if the source complies with emission limits and compliance schedules established by the EPA to bring about compliance with the requirements in sections 110(a)(2)(D)(i) and 126 as expeditiously as practicable, but in no case later than 3 years after the effective date of the finding. Thus, to determine the appropriate remedy, the EPA must quantify the reductions necessary to eliminate Portland's significant contribution to nonattainment and interference with maintenance of the 1-hour SO_2 NAAQS in New Jersey.

A. Quantification of Necessary Emissions Reductions

To calculate emissions reductions necessary to eliminate Portland's significant contribution to nonattainment and interference with maintenance of the 1-hour SO_2 NAAQS in New Jersey for the proposed rule remedy, the EPA completed AERMOD modeling of Portland units 1, 2, and 5 using the 1993–1994 Portland site-specific meteorological data.[19] As detailed in section IV, the EPA continues to believe that AERMOD is the appropriate model to make a finding that emissions from Portland contribute significantly to nonattainment or interfere with maintenance, and to calculate the appropriate emission limits for Portland units 1 and 2. In applying AERMOD to establish the remedy for the proposed rule, the EPA made several adjustments to the meteorological inputs (compared to the NJDEP modeling) which it determined to be appropriate. As described in Section IV above, the EPA continues to believe the meteorological data and model setup modifications are appropriate and we are continuing to use the same modifications for the final rule AERMOD modeling. The EPA remedy modeling also includes background concentrations that vary by season and hour of day based on the 99th percentile ambient data from the Chester, New Jersey SO_2 monitor. The EPA believes the background concentration methodology to be reasonable and appropriately conservative, and is using this methodology in the final rule modeling.

The EPA AERMOD analysis used allowable SO_2 emissions rates for Portland units 1, 2, and 5 long with stack parameters submitted by GenOn shown in Table V.A–1:

[18] When the report was submitted, there were 9 days that exceeded the 1-hour SO_2 NAAQS, as of February 17, 2011. More recent data (downloaded from the NJDEP Web site at *http://www.njaqinow.net/Default.aspx*) show that there have been 22 additional 1-hour SO_2 exceedance days at the Columbia monitor between February 18 and August 20, 2011.

[19] For completeness, the EPA included emissions from Portland unit 5 in the final rule dispersion modeling (but did not propose or finalize a revised emissions limit for unit 5). The unit 5 emissions were included in the analysis to verify that they did not impact the calculation of the final emissions limit. Due to our understanding that the other emissions sources (units 3, 4, and an auxiliary boiler) at Portland have negligible or zero SO_2 emissions, the EPA did not include those sources in the final rule modeling.

TABLE V.A–1

Source	Permitted emission rate (g/s)	Stack height (m)	Stack diameter (m)	Stack temperature (K)	Stack velocity (m/s)
Portland Coal Unit 1	733.3	121.31	3.15	418.1	32.86
Portland Coal Unit 2	1,121.0	121.82	3.84	406.0	34.19
Portland Turbine 5	12.0	42.67	6.10	821.5	36.60

The location of maximum SO_2 concentration impacts from Portland emissions were found to occur in a similar location as in the proposal modeling. Therefore, the same 100 meter receptor fine grid modeling domains were used in the final rule modeling. The controlling modeled design value impact from Portland in New Jersey based on the EPA's final rule modeling was 855.4 ug/m^3 which is the basis for quantifying the necessary emission reductions. This included a contribution from Portland units 1 and 2 of 815.0 ug/m^3, a monitored background concentration of 39.3 ug/m^3, plus a contribution of 1.1 ug/m^3 from Portland unit 5. See the final rule Modeling TSD for more information on the AERMOD setup and modeling results.

B. Summary of the EPA's Proposed Remedy Analysis

In the proposed rule, the EPA calculated the emissions reduction needed to eliminate Portland's significant contribution to nonattainment based on the maximum modeled design value concentration in New Jersey. If the modeled concentration from Portland plus background is reduced to a level that is below the 1-hour SO_2 NAAQS, then all modeled violations of the NAAQS in New Jersey are eliminated. For the proposed rule, the emissions reduction needed to eliminate all modeled violations in New Jersey was used to define the elimination of significant contribution to nonattainment and interference with maintenance.

Based on the EPA modeling results, the EPA proposed that an 81 percent reduction in allowable SO_2 emissions from Portland units 1 and 2 was needed to reduce the Portland contribution plus background to below the NAAQS.

The EPA also evaluated the modeling results to determine if an emission limit could be set that combined the total emissions at units 1 and 2. In the proposal, the EPA determined that there are many different combinations of emissions limits for units 1 and 2 that could eliminate violations of the SO_2 NAAQS in New Jersey. However, the stack parameters (exit velocity and stack diameter) of units 1 and 2 are slightly different, which causes the maximum downwind impacts from each unit to occur at slightly different locations and at different times. In addition, the EPA proposed that Portland can comply with the emissions limits in several different ways (*e.g.,* low sulfur coal, reduced operation of one or both units, and/or installation of post-combustion controls). Given all of the possible compliance options and interactions between the plumes from units 1 and 2, we were not able to effectively examine multiple compliance strategies for the proposal. Therefore, we proposed emissions limits based on an 81 percent reduction in allowable emissions at both units 1 and 2. This led to a proposed SO_2 emissions limit for unit 1 of 1,105 lb/hr (allowable emission rate of 5,820 lb/hr*0.19 [an 81 percent reduction]) and a proposed SO_2 emissions limit for unit 2 of 1,691 lb/hr (allowable emission rate of 8,900 lb/hr*0.19 [an 81 percent reduction]).

C. Summary of Comments and Responses Regarding the Remedy Modeling

Comment: One commenter noted that various methods to comply with an emissions limit (such as installation of a control device) may affect stack parameters such as exit temperature and exit velocity, which may affect the dispersion of emissions and downwind concentrations. The emissions limit was calculated using a simple ''rollback'' calculation which assumes that concentrations will be reduced in proportion to emissions.

Response: We agree with commenters that it is likely (though unknown at this time) that the strategy to comply with the final rule emissions limits will cause changes in stack parameters for units 1 and 2. In addition, we agree that this should be accounted for, but in the proposed rule, the EPA did not take into account the effect of operating load on stack parameters. The exit velocity is reduced when the plant is operating below full load. Based on information submitted by GenOn as part of its comments, the exit velocity could be reduced by as much as 50 percent when operating at or below 50 percent operating load (defined as percent of maximum heat input for each unit). To account for potential reduced plume rise and dispersion due to reduced load or control devices, the EPA ran several AERMOD sensitivity runs. We simulated the proposed remedy emissions rate for units 1 and 2 (1,105 lb/hr unit 1 limit and 1,691 lb/hr unit 2 limit) at 100 percent load, which resulted in a maximum design value concentration of 193.7 ug/m3 (which is below the 196.2 ug/m3 1-hour SO_2 NAAQS). We then ran AERMOD with the same emissions rates, but at reduced loads of 75 percent, 50 percent, and 25 percent. The exit velocity for the reduced load runs was reduced based on information submitted by GenOn. The reduced exit velocity led to reduced plume rise and dispersion and higher downwind maximum concentration impacts. The maximum concentrations at 75 percent, 50 percent, and 25 percent load were 227.3 ug/m^3, 264.3 ug/m^3, and 300.3 ug/m^3, respectively. These impacts all exceed the 1-hour SO_2 NAAQS. *See* the final rule Modeling TSD for more details on the sensitivity analysis.

In the final rule, the EPA will ensure that the NAAQS is protected (and therefore that significant contribution to nonattainment and interference with maintenance is eliminated) in two ways. First, in addition to the lb/hr emissions limit for each unit, we are finalizing a lb/mmBtu emissions limit to address modeled exceedances at reduced load. The lb/mmBtu limit is determined based on an equivalent lb/hr limit at 100 percent load for each unit. Meeting a lb/mmBtu will therefore have the effect of lowering the resulting lb/hr emissions rates at reduced loads. For example, emissions will be 25 percent lower than the lb/hr limit when operating at 75 percent load. This in turn will ensure that the NAAQS is protected at reduced loads. Modeling of emissions rates that are constrained by a lb/mmBtu limit shows that concentration impacts at reduced loads are always less than maximum concentrations at 100 percent load. *See* section VI for more details on the calculation of lb/mmBtu limits.

The second way that we are ensuring that the remedy will be protective of the

NAAQS is by requiring GenOn, as part of the increments of progress requirements, to submit a modeling protocol and dispersion modeling analysis of its final compliance strategy. GenOn will be required to show that the final remedy, as actually implemented, including any changes to stack parameters that may have resulted from steps taken to meet the limits, will be protective of the NAAQS and therefore eliminate significant contribution to nonattainment and interference with maintenance in New Jersey. *See* section VI for more details on the increments of progress requirements and schedules.

Comment: One commenter (GenOn) urged the EPA to set a combined emission limit for units 1 and 2 for both the interim limits and the final limits. GenOn submitted a modeling analysis which examined the effects of various permutations of the proposed interim limit. The commenter ran an AERMOD ''reference run'' with the proposed interim limit of a 50 percent reduction in allowable emissions at both units 1 and 2 (a total of 7,360 lb/hr). GenOn then ran two additional ''sensitivity'' runs; one with unit 1 running at its full allowable limit (5,820 lb/hr) and unit 2 at zero emissions and a third model run with unit 1 at zero emissions and unit 2 at 7,360 lb/hr (the combined limit at a 50 percent reduction from allowables). The results show that maximum design value concentrations from the sensitivity runs are less than the reference run. Therefore, GenOn argues that a combined limit will provide for air quality impacts that are equivalent to or better than the proposed individual unit limits.

Response: The EPA agrees that the operating scenarios that were modeled show that a combined limit can lead to air quality impacts that are equivalent to or better than individual limits. However, that is not true in all cases, particularly for the final emissions limits. For example, the EPA modeled the combined proposed remedy emission limits (2,796 lb/hr) individually at unit 1 and unit 2. Emitting 2,796 lb/hr from unit 2 (with no emissions from unit 1) was protective of the NAAQS (design value of 189.1 ug/m^3 at 100 percent load). However, emitting 2,796 lb/hr from unit 1 (with no emissions from unit 2) led to modeled violations at 100 percent load (225.2 ug/m^3). Due to the slightly different stack parameters of each unit, more emissions can be emitted through unit 2 without leading to a violation, compared to unit 1. Therefore, a combined emissions limit that is emitted completely from unit 1 is not protective of the NAAQS.

For this reason, based on the modeling analysis conducted by the EPA, we are not able to set a combined limit for the final remedy. (We discuss the separate question of a combined limit for the interim limit in section VII.) The final rule contains individual final limits that are specific to units 1 and 2. It is also clear from this simple analysis that any combined limit that would still be protective of the NAAQS across the full range of operating scenarios for units 1 and 2 and would necessarily be more restrictive than the 81 percent reduction on each of units 1 and 2. There are some combinations of emissions from units 1 and 2 which will be protective of the NAAQS and some that will not. The EPA is not able to model all possible combinations and then set a combined limit which is protective of the NAAQS in all cases. Should GenOn wish to have a higher limit at one of the units, in exchange for a lower limit at the other, or seek a combined limit that is protective of the NAAQS in all cases, there is an opportunity to petition the EPA for additional rulemaking to adopt alternative emissions limits, although we note that such rulemaking would require a notice and comment process. Further details are contained in section VII later.

Comment: NJDEP recommended that the final rule should require a 95 percent reduction to be phased in as soon as possible, in a time period shorter than 3 years. In support of these recommendations, NJDEP also noted that power plants in New Jersey will be required to achieve an emission rate of 0.150 lb/mmBtu by December 15, 2012, and that two facilities in New Jersey are already meeting this level.

Response: We note that section 126 does not give the Administrator discretion to establish emission limitations beyond the emission reduction necessary to eliminate Portland's significant contribution to nonattainment and interference with maintenance of the 1-hour SO_2 NAAQS in New Jersey. Sections IV and V discuss comments on the appropriate air quality models, and modeling assumptions, data and results, and their effect on the choice of the specific limits for Portland units 1 and 2.

Comment: The EPA received numerous comments generally noting the adverse health and environmental effects of SO_2 emissions and urging significant emission reductions of SO_2 from Portland, providing examples of the beneficial effects that would occur by reducing SO_2 emissions and, for these reasons, urging significant reductions.

Response: The EPA recognizes that there are potentially adverse health impacts from breathing SO_2 particularly for people who have respiratory illnesses, heart, or lung disease, older adults and children, and that SO_2 is a precursor to acid rain formation and fine sulfate particle formation that can also pose adverse health effects. These effects are taken into account in establishing the SO_2 NAAQS, and need not be revisited in this action. Therefore, this rule is directed at eliminating Portland's significant contribution to nonattainment and interference with maintenance of the 1-hour SO_2 NAAQS in the affected areas of New Jersey. Elsewhere in this section, we explain how we are using modeling to assure that we are establishing a remedy that eliminates significant contribution and results in emissions limits that are protective of the NAAQS.

D. The Final Remedy Limit

The EPA modeled a scenario using allowable emissions from Portland with 1 year of site-specific meteorological data. The maximum modeled 1-hour SO_2 design value in New Jersey was 855.4 ug/m^3. This included a contribution from Portland units 1 and 2 of 815.0 ug/m^3, a monitored background concentration of 39.3 ug/m^3, plus a contribution of 1.1 ug/m^3 from Portland unit 5. The final compliance emission limits must be set at a level that eliminates all violations of the 1-hour SO_2 NAAQS in New Jersey. Therefore, all modeled receptors must be below the level of the NAAQS (196.2 ug/m^3). The contribution from Portland can be reduced by reducing the SO_2 emissions from the Portland stacks, but the background concentrations cannot be reduced (they are held constant). Since the contribution from unit 5 is only 0.1 percent of the total contribution, a reduction in the unit 5 contribution would provide a negligible reduction to the modeled design value. Therefore, it can be assumed that unit 5 emissions do not need to be reduced, and the unit 5 concentration is added to the irreducible background value. The final compliance emission limit for the final rule is calculated as follows: ((Total modeled concentration)—(NAAQS—background))/(total modeled concentration).This formula will produce the percentage by which Portland must reduce its emissions from allowables in order to achieve compliance with the NAAQS in New Jersey. Thus, the actual calculation of Portland's contribution to nonattainment in New Jersey is ((814.9) − (196.2–40.4))/814.9, where 40.4 represents the contributions from

monitored background and unit 5. This results in a reduction of 80.9 percent of allowable emissions from Portland units 1 and 2, which we round to 81 percent. In this calculation, only the contribution from units 1 and 2 is included in the total modeled contribution.

Therefore, we are finalizing an emissions limit based on an 81 percent reduction in allowable emissions at both units 1 and 2. This leads to a final SO_2 emissions limit for unit 1 of 1,105 lb/hr (allowable emissions rate of 5,820 lb/hr*0.19 [an 81 percent reduction]) and a final SO_2 emissions limit for unit 2 of 1,691 lb/hr (allowable emissions rate of 8900 lb/hr*0.19 [an 81 percent reduction]), which are the same as the proposed limits.

As discussed earlier in response to a comment, to account for operation at less than 100 percent load and/or changes in stack parameters, the EPA is also setting a lb/mmBtu emissions limit for units 1 and 2 in the final remedy. To determine the level, we calculated the lb/mmBtu value as the emissions rate that equates to the lb/hr limits for unit 1 and 2 when operating at full load. That is, for unit 1 the lb/mmBtu limit is calculated as the lb/hour limit of 1,105 lb/hour divided by the heat input capacity of 1,657.2 mmBtu/hr, which equates to 0.67 lb/mmBtu. For unit 2, the lb/hour limit of 1,691 lb/hour is divided by the heat input capacity [20] of 2511.6 mmBtu/hr also results in 0.67 lb/mmBtu.

Compliance with the 0.67 lb/mmBtu limitation is determined on a 30 boiler operating day rolling average basis. A ''rolling'' average means that a new 30-day average can be determined on any day of operation. Similar to the proposed Mercury and Air Toxics Standards (MATS) rule, the EPA clarifies that only the hours on ''boiler operating days'' are included in the averaging, and the 30-day averaging ''zero values'' from non-operating days are not included. We use the same definition of ''boiler operating day'' as for the proposed MATS; that is, a 24-hour period between midnight and the following midnight during which any fuel is combusted in the units. The EPA recognizes that a 30-day averaging period for the lb/mmBtu limitation incorporates some variability, and that there will be hourly periods that exceed the 30-day average.

The EPA does not believe that these higher hourly values would lead to exceedances of the NAAQS for a number of reasons. First, at full or near-full load, compliance with the lb/hour limit will ensure emissions rates at or near 0.67 lb/mmBtu. Second, at significantly lower loads, Portland units 1 and 2 could emit at emissions rates somewhat greater than 0.67 lb/mmBtu and still meet the NAAQS. Accordingly, some variability within the 30-day averaging is accommodated, although the EPA expects the variability will be relatively small. For example, during 2010 the emission rate for Portland varied by only about 15 percent.

As a final check on the remedy, EPA ran AERMOD again with the above emissions limits on the Portland Plant's units 1 and 2 (and current allowable emissions from unit 5). At these emissions levels, all receptors in New Jersey had concentrations below the 1-hour SO_2 NAAQS. The maximum modeled 99th percentile (4th-highest) daily maximum 1-hour SO_2 concentration was 193.7 ug/m ^{3} (including a monitored background concentration of 39.3 ug/m ^{3}).

E. Compliance Schedule for the Final Remedy Limit

Section 126(c) initially makes it unlawful for any major existing source to operate more than 3 months after a section 126 finding has been made with respect to it; yet also gives the Administrator authority to permit continued operation under certain conditions. Specifically, the statute provides that the Administrator ''may permit the continued operation'' of such a source beyond the end of the 3 month period ''if such source complies with such emission limitations and compliance schedules (including increments of progress) as may be provided by the Administrator to bring about compliance with the requirements contained in section 7410(a)(2)(D)(i) of this title or this section as expeditiously as practicable, but in no case later than 3 years after the date of such finding.'' 72 U.S.C. 7426(c).

Section 126, however, does not give the Administrator unlimited discretion when establishing emission limitations and compliance schedules. Instead, the statute provides that the emission limitations and compliance schedules must bring about compliance with the requirements of section 110(a)(2)(D)(i) of the Act ''as expeditiously as practicable'' but in no case later than 3 years from the date of the finding. The use of the phrase ''as expeditiously as practicable'' allows for consideration of the time needed to implement a compliance option in setting a compliance schedule. However, the length of time needed to implement any given compliance option depends on the particular compliance option to be implemented. Furthermore, the EPA recognizes that in some instances a source may choose to cease operation as its method of compliance. In the proposed rule, the EPA requested comment on the meaning of as ''expeditious as practicable'' in this context.

1. Proposed Compliance Schedule

The EPA proposed to allow continued operation of Portland beyond 3 months provided that the facility operates in compliance with final emission limits within 3 years and with interim emission limits and procedural increments of progress. In this section we discuss our response to comments on the appropriateness of a 3-year deadline for the final limits (*See* section VI.A. below for further discussion of interim limits and other increments of progress).

2. Public Comments and the EPA's Responses

In the proposal, the EPA recognized both that the statute requires that any compliance schedule ensure compliance ''as expeditiously as practicable'' and also that, while the statute directs the EPA to establish emission limits and compliance schedules, it does not foreclose the EPA from allowing the source to select a compliance option. In the proposal, the EPA noted its desire to seek a balance between the statutory requirement of compliance ''as expeditiously as practicable'' and the goal of ensuring that the regulation does not unnecessarily limit the options available to the source to achieve compliance within the statutorily mandated time period. The EPA did not receive any comments specifically challenging the EPA's balanced approach to interpreting the statutory language. Accordingly, the EPA's final remedy in this rulemaking has been developed consistent with these goals.

Comment: The EPA received a general comment comparing the ''as expeditiously as practicable'' language in section 126 to our interpretation of that language in the MATS rule. The commenter suggests that we should always interpret ''as expeditiously as practicable'' to mean 3 years.

Response: While the EPA is permitting 3 years in this case, the commenter's interpretation is inconsistent with the language of section 126 because, by saying ''in no case later than 3 years,'' the statute contemplates that compliance might be required sooner than 3 years.

The EPA also received a number of specific comments on technical feasibility issues and other issues

[20] Heat input capacities were from the Title V Permit No. 48–0006.

related to the 3-year compliance period for the final remedy. A number of commenters believed that a 3-year period was too generous and that Portland units 1 and 2 should achieve needed emissions reductions in a shorter time period. Other commenters questioned the feasibility of meeting the limits within 3 years and recommended that the EPA should harmonize the requirements of this rule with those of other rules regulating electric generating units (EGUs). The following sections discuss EPA's responses to the comments in each of these issue categories.

a. Technical Feasibility

Comment: Several commenters objected to the 3-year compliance period and recommend an abbreviated compliance schedule or a schedule that requires compliance with the final limits in less than a year. Some commenters believed that technologies necessary to achieve the emission reductions could be installed and operating within 1 year (for example, dry sorbent injection or DSI) or 2 years (dry scrubbing). Others cited the availability of very low sulfur coal, such as sub-bituminous coal from the Powder River Basin (PRB) in Wyoming, asserting that emission reductions could be achieved in a shorter time period than 3 years. Another commenter noted that the Keystone Generating Plant located in Pennsylvania installed a scrubber within 3 years, and reduced SO_2 emissions by 98 percent. One commenter cited the EPA estimates of a 24–27 month time period for dry and wet scrubbing, and recommended that we replace the 3-year requirement with a time period consistent with those estimates. Other commenters, including GenOn, were concerned that the proposed final limits could not be achieved within 3 years.

Response: We believe that 3 years represents an expeditious schedule for GenOn to meet the emissions limits for this rule. While we are not mandating any particular control technology or approach, the EPA believes that GenOn would have a number of possible options, which may need to be used in combination, to evaluate for compliance with the rule. These options could include, among others: (1) Switching to very low sulfur coal as a number of facilities have undertaken as a result of the acid rain program and the Clean Air Interstate Rule, (2) switching to lower sulfur coal in combination with lower-capital cost technologies such as reagent injection of Trona or sodium bicarbonate, and (3) continued use of higher-sulfur coal in combination with dry scrubbing or wet scrubbing.

While the first option, switching to very lower sulfur coal such as Wyoming Powder River Basin (PRB) coal, may be a possibility for Portland, the EPA notes that the type of sub-bituminous coal that would be necessary to achieve the final remedy would have markedly different fuel and handling characteristics, necessitating changes not only in the coal handling and preparation operations but also to the boilers. Publications [21] discussing examples of the design changes necessitated by switching from bituminous to PRB coal are included in the docket for this rulemaking. The EPA believes that 3 years would be a reasonable time period to evaluate and accomplish all of the necessary operational changes.

The EPA believes the second option is available; that is, switching to somewhat lower-sulfur coal such as Central Appalachia coal (CAAP) to achieve some of the needed reductions, with the remainder of the reductions achieved through a reagent injection system achieving reductions of 50–60 percent. For the proposed rule, the EPA requested comment on its view that such a reagent injection system could be built within 1 year. The EPA agrees with comments that observed that, in virtually all cases where such reagent injection systems have been installed, the facility has also included a fabric filter for particulate controls. Accordingly, the EPA agrees with commenters that it would take longer than 1 year to accomplish any operational changes necessary to switch to somewhat lower sulfur coal, to install and operate the reagent injection system, and to install a fabric filter to replace or supplement the current particulate controls. Development of a system that adequately controls SO_2 and maintains acceptable levels of PM controls could likely not be achieved within a 1-year period, and most likely would take considerably longer. At the same time, the EPA disagrees with commenters who suggest that there are feasibility concerns for compliance within 3 years, the maximum amount of time provided for compliance under section 126. There are three steps to carrying out this control option: (1) Operational changes related to changing the coal supply, including blending, (2) construction and operation of the reagent injection system, and (3) implementation of any changes necessary to ensure continued effectiveness of particulate controls. However, as proposed, we believe the first two steps are achievable in 1 year, but construction and operation of a fabric filter is also necessary, and this step could take up to 2 additional years.

The third option, under which Portland would install a dry or wet scrubber, likely would achieve a greater degree of control than necessary to meet the lb/hr and lb/mmBtu limits in this section 126 rule. The EPA recognizes that given investment decisions for the suite of regulations, including the Transport Rule, the present section 126 rule, and the upcoming MATS rule, Portland may choose to install these controls. If this option were selected, the EPA continues to conclude that these scrubber controls could be installed within 3 years. (Although such controls have been installed in 24–27 months, the EPA believes that it is reasonable to provide the full 3 years to permit Portland the time needed to evaluate its options.) We note, however, that in the Integrated Planning Model (IPM) which was used to evaluate the impacts of the Transport Rule, we did not forecast dry or wet scrubbing as the least-cost option for compliance for the Portland facility. Rather, the IPM predicted a switch to lower-sulfur bituminous coal in combination with reagent injection. IPM model results are available in the Transport Rule docket at EPA–HQ–OAR–2009–0491–4440 (*http://www.regulations.gov/#!documentDetail;D=EPA–HQ–OAR–2009–0491–4440*), and on the EPA's Web site at *http://www.epa.gov/airmarkets/progsregs/epa-ipm/transport.html*.

b. Continued Operation of Facility in the Interim Period

Comment: The NJDEP commented that if significant reductions cannot be made expeditiously, Portland should not be allowed to operate, and that the burden to justify any operation beyond 90 days should be on the Portland facility owners and operators.

Response: The EPA disagrees with the commenter's recommendation that Portland be required to shut down pending implementation of emissions controls. Under section 126 of the CAA, the statute permits the continued operation if the source complies with emission limitations and compliance schedules established by the

[21] *See* B. Exner, *et al.,* Successful NOx Reduction and Conversion to Powder River Basin Fuel on Wall Fired Boilers, Foster Wheeler (1996), available on the web at: *http://www.fwc.com/publications/tech_papers/files/TP_FIRSYS_96_01.pdf*, and available at Docket ID EPA–HQ–OAR–2011–0081; R. Barnum, *et al.,* Fuel-Handling Considerations When Switching to PBR Coals, Power (November/December 2001), available on the web at *http://www.prbcoals.com/pdf/PRBCoalInformation/PRB–FuelHandling.pdf.* and available at Docket ID EPA–HQ–OAR–2011–0081.

Administrator. The EPA is including emissions limits and compliance schedules in this rule sufficient to expeditiously eliminate Portland's signification contribution. The EPA does not believe that the statute mandates that the source cease operation at the 90-day milestone under these circumstances. The statute's explicit recognition that the compliance schedules must be ''practicable'' suggests that it is reasonable for the Administrator to permit continued operation consistent with such compliance schedules and emissions limitations.

c. Harmonization With Other Requirements

Comment: Some commenters urged the EPA to defer action on the section 126 petition to enable the EPA to harmonize the schedule and requirements for this rule with requirements of other pending and final rules. Those commenters believed that harmonization with these rules, including the MATS rule and the Transport Rule, would enable GenOn greater opportunity for fully informed investment decisions that take into account all of the applicable regulations.

Response: The EPA is sensitive to the desirability and advantages of harmonized regulatory requirements. We understand that Portland's actions to address its significant contribution to nonattainment and interference with maintenance of the 1-hour SO_2 NAAQS are occurring in relatively close proximity to actions it may take to address its contribution to nonattainment and interference with maintenance of the 1997 ozone NAAQS and the 1997 and 2006 p.m.$_{2.5}$ NAAQS under the recently-finalized Transport Rule, as well as actions it may need to take to address its emissions of Hazardous Air Pollutants under the forthcoming MATS rule. We recognize the value for GenOn in having the ability to make informed investment decisions that optimize strategies for addressing these pollutants concurrently.

The EPA notes that, in contrast to when this rule was initially proposed, the final requirements of the Transport Rule are now known. Pennsylvania is one of the states whose facilities are subject to the Transport Rule which establishes an emissions budget for Pennsylvania, allocates allowances to facilities in Pennsylvania, including Portland, and allows Portland's owners to trade those allowances with other power plants through an allowance trading market. Portland allowances for 2012 and 2014 are listed in a technical support document to the final Transport Rule located at *http://epa.gov/airtransport/pdfs/UnitLevelAlloc.pdf.* There are, however, a number of differences between this rule addressing section 126 of the CAA and the requirements of the Transport Rule. First, in addressing NJDEP's section 126 petition related to ambient 1-hour SO_2, the EPA must ensure that the SO_2 emissions from Portland do not significantly contribute to nonattainment, or interfere with maintenance of the 1-hour ambient SO_2 standard of 75 ppb, a relatively localized pollutant source-oriented, in New Jersey. In contrast, the Transport Rule addresses SO_2 emissions in the context of downwind $PM_{2.5}$ problems, a highly transported pollutant, in many states. As a result, this section 126 rule does not provide for emissions trading with other facilities, while the Transport Rule does allow for such trading. Second, the schedule for the Transport Rule is somewhat different from this rule. Under the Transport Rule, Portland must show for 2012 (that is the calendar year January through December) and subsequent years that it holds allowances sufficient to cover its annual emissions. These requirements for 2012 precede the requirements for this section 126 rule, which requires the source to meet interim emissions limits within 1 year (early 2013) with 3-year requirements taking effect in early 2015. Notwithstanding these differences, which stem from the different CAA requirements being addressed, we believe that with the finalization of this rule, Portland has the information it needs to make an informed decision on how to comply with both rules.

At this time, the MATS rule is not final. The EPA has proposed the MATS rule and is under a consent decree deadline to complete that rule by December 16, 2011. The proposed MATS rule contained proposed requirements for hazardous air pollutants, including existing sources of acid gases (*e.g.,* hydrogen chloride). The MATS rule does not directly regulate SO_2 but in the proposal the EPA provided its assessment that the acid gas requirements of the proposed MATS would have substantial SO_2 co-benefits. While the date of this section 126 rule does not exactly coincide with the date for the final MATS, these two rules are expected to take effect within a short time of each other. Accordingly, the EPA believes that GenOn will have the information it needs to make an informed decision on how to meet both this final rule and the MATS.

Even if the schedules did not coincide so closely, the EPA does not believe it would be appropriate to defer action on NJDEP's section 126 petition to achieve such harmonization. The EPA is required by the CAA to take action on NJDEP's petition within 60 days (plus a 6 month administrative extension granted in this case), and this time period has already passed. We could not delay lawfully this rulemaking by any significant time period to coincide with the date for the final MATS rule. The EPA also notes that full harmonization is limited by statutory constraints. While there is some flexibility within section 112 of the CAA to provide for a 4-year compliance period under certain circumstances, this flexibility is not afforded under section 126. Under section 126, the EPA cannot alter the statutory requirement that the source eliminate its significant contribution to nonattainment and interference with maintenance within 3 years of the section 126(b) finding. Notwithstanding these constraints, as previously noted, our expectation is that requirements for MATS, like those of the Transport Rule, will be known in time to allow for consideration of integrated strategies for compliance with MATS, the Transport Rule, and the present section 126 action.

The Final Rule

Based on the above considerations, we are retaining the 3-year compliance date for the final limit. Adopting a substantially shorter time frame than 3 years could not only restrict the options for Portland to achieve the necessary reductions, but could render each of them impracticable within that time frame. Because shorter time frames have the effect of narrowing the available options, we are retaining the 3-year compliance date for the final limit.

F. Other Considerations for Establishing the Final Remedy

1. Economic Feasibility

Comment: Several commenters stated that the importance of the Portland facility to the local economy should be taken into account, and that we should not take an action that causes operations at Portland units 1 and 2 to be no longer economically viable. These commenters contend that there are limits to the costs the facility can withstand and remain in operation, and that the facility should be allowed to meet interim and final limits in the most cost-effective and efficient manner possible. Commenters expressed concerns regarding the practicality of expending high costs on scrubber installation considering the size and age of the units at Portland, and questioned the feasibility of replacing

Portland units 1 and 2 with comparable combined-cycle natural gas-fired units.

Response: The EPA stresses that in carrying out the statutory obligation to address the SO_2 exceedances caused by the Portland facility, we are doing so in a way that meets those obligations but is not overly prescriptive. We allow the facility owners to choose the most cost-effective solution. While there are many factors, some completely unrelated to this rule, which may impact the long-term operation of the facility, the EPA is striving to provide opportunities for flexible solutions to address section 126 of the CAA. In particular, the rule does not mandate, nor do we expect, the Portland owners and operators to install high capital-cost options suggested by commenters, such as wet scrubbing or replacement with combined-cycle natural gas units (although the rule also does not rule them out as options). The source would more likely choose the control technology best suited to achieving the required emission limits, including the most cost-effective technology for the facility. It is also useful to note that in the EPA's IPM modeling of the effects of the Transport Rule over a wide region, the model predicted that less than 0.5 percent of capacity would be lost as a result of the rule. While these models are less reliable in assessing plant-specific conditions, the EPA believes that the general indication of minimal capacity loss, together with the availability of less capital-intensive control options, suggest that Portland can achieve the needed reductions without substantially affecting the economic viability of the plant.

2. Requirement for Continuous Monitoring

Comment: One commenter suggested that the EPA should add a requirement in the final rule to require Portland to operate CEMS for SO_2 emissions at the plant.

Response: The EPA acknowledges the importance of CEMS to ensure compliance with emissions limits. However, GenOn is already required to operate CEMS to monitor SO_2 emissions at Portland in accordance with requirements in 40 CFR part 75. Our regulations for monitoring SO_2 emissions from power plants with CEMS require the owner or operator to ensure that all CEMS are in operation and monitoring unit emissions at all times the affected unit combusts any fuel. Regulations in part 75 provide limited exceptions during periods of calibration, quality assurance, or preventative maintenance, but do not provide any exemptions for startup, shutdown, or malfunction of the combustion unit. The EPA concludes that the CEMS already required for Portland under part 75 provide sufficient monitoring for compliance determinations for SO_2 emissions at Portland, and for the final rule we refer to part 75 as the primary method for determining compliance.

3. Delegation of Enforcement

Comment: One commenter suggested enforcement of any emissions limits or other restrictions on Portland related to this section 126 action should be delegated to the NJDEP as New Jersey is the downwind receptor of emissions from Portland.

Response: Ensuring that the Portland facility complies with the requirements of the CAA including the provisions of this final rule is the responsibility of the EPA. It will ultimately become the joint responsibility of the EPA and of the Pennsylvania Department of Environmental Protection (PADEP), because PADEP has primary responsibility for implementing and enforcing the Pennsylvania SIP. The EPA notes that CAA section 110(a)(2)(D)(ii) requires Pennsylvania's SIP to ''ensure compliance with the applicable requirements of section 7426 * * * of this title'' (*i.e.,* section 126 of the CAA). Because these requirements must become part of the SIP for Pennsylvania, they will be subject to enforcement in the same manner as any other requirement of a SIP. This includes the ability of third parties to raise challenges under the citizen suit provisions of section 304 of the CAA. Thus, New Jersey and its citizens will have ample opportunity for enforcement under these provisions of the statute.

VI. Increments of Progress

This section discusses issues concerning whether and how EPA should establish appropriate increments of progress toward the final remedy. The statute does not define ''increments of progress.'' The EPA has discretion to define appropriate increments of progress on a case-by-case basis. The increments of progress required in a particular case may vary depending on the facts of the petition but should provide incremental progress towards eventual compliance with the requirements of section 110(a)(2)(D)(i). Section VI.A discusses interim emission limits, and section VI.B discusses reporting milestones during the 3-year period for the final remedy.

A. Interim Emission Limits

As noted previously, section 126 allows the EPA to allow continued operation of a source beyond a 3-month time period if the source complies with ''emissions limitations and compliance schedules (including increments of progress). In this section we discuss issues related to whether the increments of progress should include interim emissions limits and the final rule requirements for progress milestones and reports.

1. What the EPA Proposed

The EPA proposed interim emission limits for Portland units 1 and 2. Specifically, the EPA proposed to require Portland to meet an SO_2 emissions limit of 2,910 lb/hr for unit 1 and 4,450 lb/hr for unit 2 within 1 year. These unit-specific emission limits represented 50 percent of the allowable emissions rate for each unit that was used for the EPA air quality modeling. The EPA proposed these interim reduction requirements because section 126 calls for ''increments of progress,'' and because we believed that there were readily achievable interim steps that could be accomplished in this instance. In the proposal, the EPA discussed its evaluation of available SO_2 emission reduction options for meeting the interim emissions limits such as reagent injection, switching to lower sulfur coal and load shifting. The EPA requested comment on the proposed interim reduction requirements for units 1 and 2, on the achievability of the limits in the 1-year time period proposed, and on the impact of the reductions on the reliability of the grid.

2. Public Comments and the EPA's Responses

a. Appropriateness of Including Interim Emissions Limits

Comment: One commenter, GenOn, asserted that the EPA should not establish interim limits because those interim requirements may be inconsistent with the requirements of the Transport Rule or MATS requirements. Moreover, the same commenter believed that because the EPA has discretion not to impose interim emissions limits under section 126(c), and because of this need for long-term harmonization with the Transport Rule, MATS and other requirements, the EPA is not justified in imposing the interim emissions limitations.

Response: The EPA disagrees with comments that the EPA should exercise discretion provided by section 126 and remove the interim emissions limits from the final rule. As noted later in this section in our discussion of other GenOn comments, we believe that there

are readily available measures for Portland to make significant progress in the short term that in no way impede or conflict with achievement of the 3-year limits. Additionally, based on our assessment of the steps necessary to achieve these limits, implementation of these interim measures would complement, rather than conflict with, the measures needed for meeting this rule as well as the Transport Rule and MATS.

b. Technical Feasibility of Coal Switching

Comment: In its comments, GenOn recommended that, should the EPA retain the interim emissions limitations, the EPA should defer them until GenOn can undertake necessary coal test burns to determine what limits are reliably achievable. GenOn comments further stated that it may be able to meet interim emissions limits if a reasonable time table and level is set based upon coal test burn results, but that a full evaluation of the practicality of interim limits was not possible by the June 13, 2011, deadline for public comments. GenOn indicated its intent to conduct initial coal testing by September 15, 2011. Finally, to provide GenOn with greater flexibility, GenOn requested that the EPA revise the form of any interim limits for Portland units 1 and 2; that is, the EPA should establish the limits as combined emissions limits for the total emissions from units 1 and 2 rather than establishing limits that would apply to each unit.

Subsequent to the close of the comment period, GenOn submitted a report of the September 15, 2011, test burn referred to in its comments. For the final rule, the EPA took this test burn report into consideration. In the test burn, Portland blended its existing Northern Appalachia coal supply with varying amounts of low sulfur Central Appalachia coal from West Virginia. For each unit, the test burn assessed the impacts of varying blending cases on the unit's generator output, the reduction in SO_2 emissions, and the effect on the performance of the electrostatic precipitators. The test burn report also noted facility changes in coal handling, feeder, and hopper systems that would be needed to allow for routine use and blending with lower sulfur coal in the future.

In its comments, and in the later test burn report, GenOn commented that, based on initial evaluations of the coals economically available to be used to meet the proposed interim emission limits, the use of lower sulfur coal is projected to cause significant production derates at Portland units 1 and 2. That is, GenOn asserted that the total megawatts (MW) of electricity output from the plant would decrease if GenOn were to use a lower sulfur coal blend sufficient to meet the interim limits.

Response: The EPA considered the test burn report along with other information relevant to the establishment of an interim limit. We continue to strongly believe that significant reductions in SO_2 emissions can be achieved within 1 year. We do not disagree that, aside from a reduction in electrical output, the use of lower sulfur coal may indeed be the only viable option to meet interim limits at Portland. The EPA, however, remains convinced that lower sulfur Appalachian coals are readily available for use at Portland. This opinion is supported by recent Central Appalachian thermal coal quality and production data from Wood Mackenzie, published in April 2011. According to Wood Mackenzie data, Central Appalachian production of thermal coal in 2010:

- Had a mean SO_2 content of about 1.5 lb/mmBtu, which could allow a significant SO_2 emission reduction from current coal usage, with ample margin to accommodate typical coal quality variations;
- Had a mean higher heating value of nearly 12,600 Btu/lb, which is likely well within 10 percent of the heating value currently used at Portland; and
- Amounted to about 130 million tons, including amounts that are about 50 times any possible maximum annual demand for low sulfur coal from Portland.

The EPA is aware that changes in the characteristics of the coal (moisture content, ash content, grindability, *etc.*) used at Portland could change the performance of the Portland units. Although GenOn indicates that equipment modifications would be necessary to maintain the use of 100 percent CAAP coal for a sustained period of time, the EPA notes that during the test burn with 100 percent CAAP coal, the generator output for unit 1 is relatively close to rated capacity (162 versus 171 MW, approximately 5 percent). Also the EPA notes that it is not unusual for installation of air pollution controls to result in a modest de-rate, and the EPA does not believe that maintenance of 100 percent of current output should be seen as a constraint on the appropriateness of the interim limits. In addition, the test burn report, which evaluated one particular coal supply, is silent on the availability of a potentially more costly Central Appalachia coal that would allow each Portland unit to maintain closer to full load, and what boiler upgrades are necessary to improve generator output. The EPA is also aware of proven measures that the EPA believes can be applied relatively quickly to enhance PM control at Portland if needed due to coal switching, so as to meet a new, lower interim SO_2 emission limit while continuing to meet all other existing emissions limits. Two such measures include various upgrades to Portland's electrostatic precipitators (ESP) and/or use of flue gas conditioning, both of which have been routinely used by coal plant operators to improve or maintain ESP performance when switching to a lower sulfur coal that might impact performance.

The EPA has reviewed the information from GenOn on the possible equipment changes, and has also reviewed our previous determinations of the time needed to accomplish those changes. The EPA's engineering judgment is that these changes can be accomplished within 1 year.

c. Interim Limits Suggested by the GenOn Test Burn Report

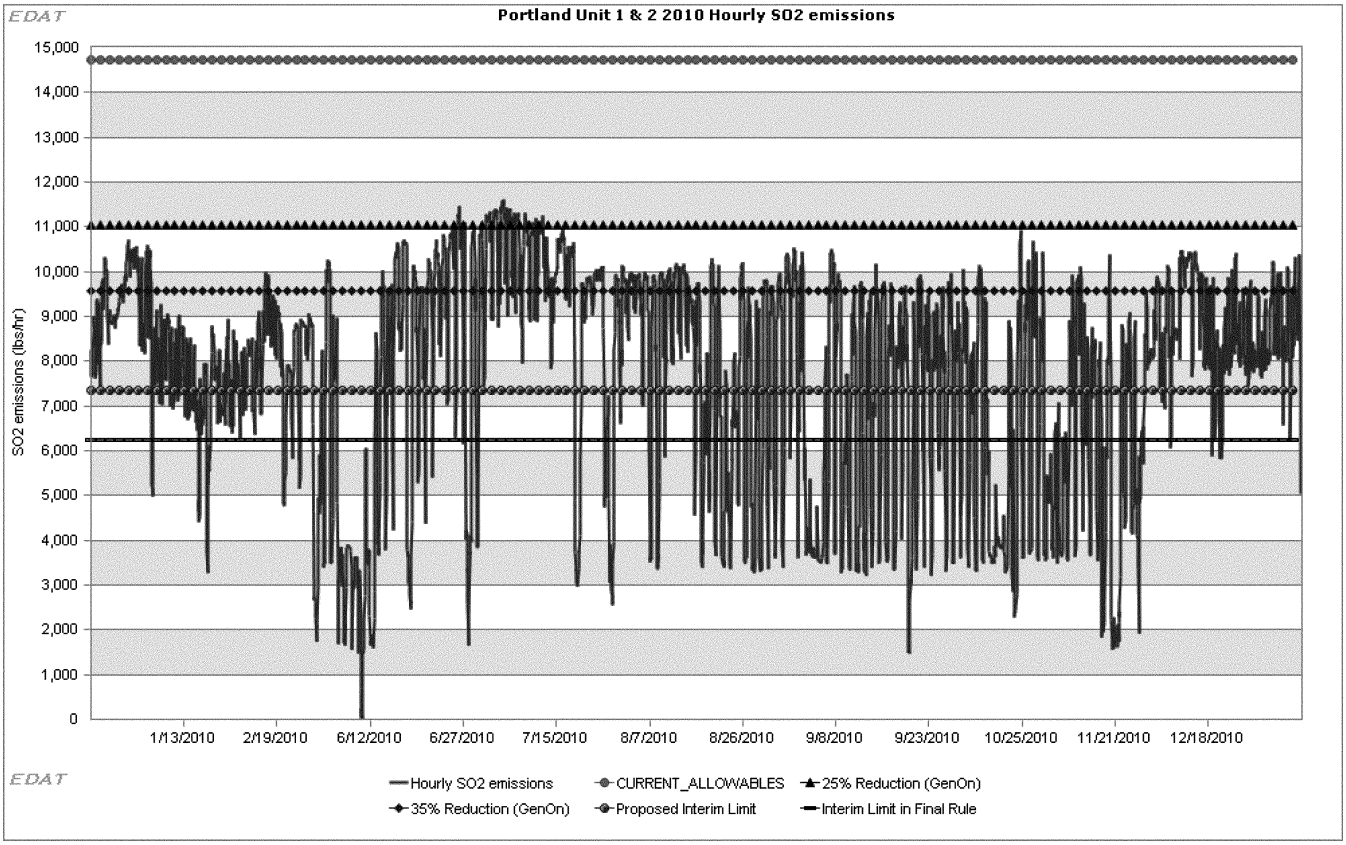
Comment: Based on the results of the test burn report, GenOn concluded that (1) Sustained unit operations using a blend of Northern and Central Appalachia coals sufficient to achieve a 25 percent reduction in allowable SO_2 emissions is achievable with a modest investment and an implementation schedule of 6 months, and (2) sustained unit operations using a blend of Northern and Central Appalachia coals to achieve a 35 percent reduction in allowable SO_2 emissions should be achievable with additional investments and an implementation schedule of 8 to 12 months after GenOn has established an operational record and completed equipment performance evaluations at the 25 percent reduction blend level, and any necessary permits are acquired.

Response: The EPA evaluated the suggested interim reductions in the GenOn test burn report. The EPA concluded that based upon this evaluation, these targets are significant underestimates of the readily available interim emissions reductions, represent very minimal reductions from current operations, and are inconsistent with the results of the test burn.

Figure VI.C–1 shows the hourly SO_2 emissions for all of 2010 at Portland, shown as the sum of emissions from units 1 and 2. For the EPA (and GenOn's) air quality analysis, the assumed allowable emissions rates for units 1 and 2 were 5,820 lb/hr and 8,900 lb/hr, respectively, resulting in a total allowable rate of 14,720 lb/hour. A 25

percent reduction from this amount, that is a 25 percent reduction from current allowable, thus becomes 11,040 lb/hr. As shown in Figure VI.C–1, during 2010, Portland's hourly emissions exceeded 75 percent of allowable emissions only rarely. Accordingly, a 25 percent reduction in allowable emissions effectively represents status quo operations. A 35 percent reduction in allowable emissions, or 9,568 lb/hr, would require at most a roughly 15 percent reduction in current emissions. EPA continues to believe that the facility can make much more significant reductions in line with the final interim limits within a year.

Figure VI.C-1. Comparison of 2010 Emissions from Portland Units 1 and 2 with Allowable Emissions and Different Levels of Reduction from Allowable Emissions.



d. Load Shifting

Comment: GenOn commented on the EPA's assessment that the proposed interim limits could be met via ''load shifting.'' GenOn disagreed with the EPA's assessment that load shifting is a viable option to meet an interim limit. In its comments, GenOn interpreted the term ''load shifting'' as referring to the ability of a utility to continue to serve its customer load obligations by reducing utilization or ''load'' from a selected generator and increasing the output at other facilities owned by the same utility: The load is ''shifted'' to other generators that the company operates. Because GenOn's Portland plant is a merchant plant that operates in a competitive, centrally cleared and dispatched, Independent System Operator (ISO) market, GenOn noted that replacement energy likely would come from one of GenOn's competitors, and it is possible that Portland's production would be ''shifted'' to a less efficient unit that might have higher emissions than Portland units 1 and 2. Additionally, as a ''capacity resource owner,'' GenOn is required under the Pennsylvania-New Jersey-Maryland Interconnection (PJM) tariff to bid the Portland units into the PJM energy market every day and make the units available to generate unless specific circumstances, such as a unit outage, arise that precludes operation of the plant.

Response: The EPA agrees that the proposed rule could have used a clearer term than ''load shifting'' in describing the possible ways the interim emissions limits could be met. The EPA appreciates the distinction that GenOn makes in regard to load shifting within a utility's own assets versus load shifting in a competitive market. The EPA did not mean to imply in its brief mention of load shifting that we reached a conclusion that GenOn would merely shift any load reduction at Portland to another GenOn facility. Rather, our use of the imprecise term ''load shifting'' was referring to the ability of Portland to reduce its operation as a way to meet the interim lb/hr limits, or as a partial solution to meet the limits in combination with other approaches. The EPA recognizes the open market aspects of the PJM energy market including the probability that the load can shift to other operators. These market realities are characterized in detail in the models we use to forecast the effect of EGU regulations on the utility industry. In response to Portland's observation that

the facility that replaces Portland's output could be higher-emitting, the EPA observes that while its output would likely be more expensive than Portland's energy, there is a good possibility that the energy would be replaced with a scrubber or a gas-fired unit, either of which could have much lower emission rates than Portland, given the relatively high emission rate from Portland. As an older relatively uncontrolled plant, much of the generation capacity would be expected to emit less per unit of generation than the Portland facility.

e. One-Year Time Period

Comment: One commenter, NJDEP, believed that the 1-year period allowed for too much time for the Portland facility to meet interim emissions limits, and that the interim limits were insufficiently stringent. NJDEP in their comments urged the EPA to ensure that we require interim reductions no less than 80 percent within 90 days.

Response: The EPA disagrees with this comment. An 80 percent reduction would represent nearly the 81 percent reduction required by the 3-year limits in the final rule. As discussed in section VI.A above, we believe that the 3-year period is an ''expeditious'' schedule for emissions reductions of this magnitude, and that this level of reduction would not be achievable in a 90-day time period.

Comment: Another commenter, PADEP, noted that if the proposed 50 percent reduction in the maximum allowable SO_2 emissions can only be achieved by the installation of sorbent injection technology, the 1-year deadline for complying with the interim limit does not provide sufficient time for permitting, purchasing, and installing the technology. Therefore, in lieu of setting specific interim emission limits and deadlines, PADEP recommended that the EPA work with NJDEP, GenOn, and PADEP, as the permitting agency, to establish emission interim emission limits and compliance schedules containing increments of progress consistent with CAA section 126(c).

Response: The EPA believes that this approach would not be consistent with the statute. Under section 126, the Administrator is to set the emission limits and compliance schedules, and must accomplish these through a notice and comment rulemaking. While we have considered the comments of all the parties noted by the commenter, it would not be appropriate for the EPA to defer the compliance schedules to a future negotiation with the source owner and states.

On the other hand, as discussed previously in section V.E, the EPA does agree with the commenter, and with others who made similar observations, that reagent injection may not be achievable within 1 year because Portland may need to upgrade its particulate matter collection equipment. Accordingly, we no longer believe that reagent injection alone serves as a technical basis for the interim emissions reduction requirements in the final rule. Nevertheless, after analyzing the comments regarding the feasibility of switching to cleaner coal and the necessary time frame for doing so, we do believe that this is an appropriate basis for the interim limit. Thus, the EPA has determined that it is feasible for Portland to achieve interim reductions within 1 year that would achieve significant progress toward the final remedy limits, would not interfere with Portland's progress toward meeting those final limits, and would result in important public health benefits in the interim.

f. Effect of Interim Limits on Reliability

Comment: In response to the EPA's request for comments on the effects of the interim limits on electric reliability, one commenter noted that Portland is uniquely situated to supply power to the PJM power interconnection from a location close to the source of demand, that power transmissions coming from the Midwest are hampered by long distance transmission losses, and that transmission lines are already approaching overload. Another commenter, NJDEP, indicated that the 400 MW generated by the plant is relatively small compared to PJM's current total capacity of 163,500 MW. NJDEP also concluded that it is unlikely that these units would be needed to prevent brownouts or blackouts, but that in the unlikely event that these units are necessary, the EPA could include a condition that the units may only be run when called on by PJM to provide power during a Maximum Emergency Generation Event.

Response: The EPA agrees that given large reserve margins, we do not expect that the interim limit will cause adverse effects on electricity reliability. The EPA notes that the test burn reports cited above show that at worst, in meeting the interim limits the facility would be projected to continue operating under a small derate, and given the significant reserve margin noted by the commenters, continued operation of Portland at an occasionally lower rate would not be expected to have an adverse effect on the PJM system's ability to deliver needed power. Consequently, the EPA does not believe it is necessary to make any provision for use of Portland to address potential emergency events.

g. Clear Rationale for Limits

Comment: One commenter, PADEP, noted its view that while section 126 expressly provides for increments of progress, there is no provision in the CAA to suggest that a 50-percent reduction must be made within 1 year of a finding. Without the EPA fully explaining the rationale for these proposed interim emission reductions and timelines, this commenter believed the EPA's interim requirements could be viewed as arbitrary and capricious.

Response: EPA has discretion under section 126 to establish reasonable interim emissions controls. For reasons discussed above, the EPA has a clear rationale for the interim emissions limits in the final rule. These limits are based upon the ready availability of coal with a sulfur content of 1.5 lb/mmBtu. We have reviewed the data on existing coal supplies, carefully reviewed information on available technologies, and established the interim limits based upon that review.

h. Combined Emission Limits

Comment: GenOn requested in its comments that any interim emissions limits for Portland units 1 and 2 should be expressed as a combined limit for the two units, rather than on a unit-by-unit basis.

Response: The EPA agrees with GenOn that for the interim limits, a substantial ''increment of progress'' towards meeting the ultimate (in this case, 3-year) limit is achievable regardless of whether the emissions limit is expressed as a combined limit or on a unit-by-unit basis. Accordingly, for the final rule, we are adopting an interim limit that will be a single combined limit, rather than separate limits, for units 1 and 2. As with the 3-year limit, the EPA will evaluate compliance based on available test data including part 75 CEMS data. The EPA believes that the combined limit will provide GenOn with greater flexibility to implement a variety of combinations of options to satisfy the interim limit, which should in turn serve to reinforce the EPA's view that there are readily available measures for Portland to employ in meeting the interim emissions reduction requirement.

The EPA notes that for the interim emissions reduction, unlike the 3-year limit, there is no explicit air quality goal defined by the Act. For the 3-year limit, it is essential that the limit ensure that Portland fully eliminates its significant

contribution to nonattainment and its interference with maintenance of the 1-hour SO_2 NAAQS. For the interim reductions, however, the goal is to establish ''increments of progress'' towards meeting emissions limits that fully comply with section 126. Accordingly, for the 3-year limit, the EPA concluded it was essential for the final rule to include lb/mmBtu limits to ensure that the NAAQS were protected at all loads. However the EPA determined that it was not necessary to include similar lb/mmBtu limits for the interim limits. We also determined that establishing lb/mmBtu limits in the interim might unnecessarily restrict Portland's flexibility in the interim, since the 1-year compliance deadline already constrains the available options to meet such a limit.

3. Final Rule Interim Emission Limits

For the final rule, the EPA includes a combined interim limit of 6,253 lb/hour for the total SO_2 emissions from units 1 and 2.

The basis for the final limit differs from the proposed rule. For the proposal, the EPA calculated the unit-by-unit proposed limits as 50 percent of the allowable emissions rate used for the EPA air quality modeling. We believe that for the final rule it is preferable to base these interim limits on coal characteristics of readily available coal supplies. For the final rule, the combined interim limit is based on the EPA's assessment that coal with sulfur content of 1.5 lb/mmBtu is readily available and its use at Portland is achievable within 1 year. Using this 1.5 lb/mmBtu value as the basis for the calculation of the combined interim limit, we calculated [22] the limit as follows:

For Unit 1: 1657.2 mmBtu/hr × 1.5 lb/mmBtu = 2486 lb/hr
For Unit 2: 2511.6 mmBtu/hr × 1.5 lb/mmBtu = 3767 lb/hr
Total combined emission rate = 6253 lb/hr

We agree with the commenters who feel strongly that this interim limit is very important to include in the final rule, not only because it drives progress toward the final remedy, but also because of the air quality and public health benefits that will be realized in the interim. While the limit is not calculated based on specific air quality criteria, these readily available interim reductions will serve to markedly reduce the number of days with SO_2 violations in New Jersey, and will serve to greatly reduce SO_2 concentrations on days with remaining violations. We do not know what specific approach Portland will use to comply with the interim limit, so we cannot quantify the decrease in SO_2 concentrations at specific locations, but we do note that the interim limits will result in significant SO_2 emissions reductions within the first year and make important progress toward the elimination of SO_2 violations within 3 years. These limits represent a 46-percent decrease from peak 2010 actual emissions. Moreover, the most significant reductions will occur during the hours when the emissions are the highest. During 2010, more than 40 percent of the hours that Portland operated resulted in emissions that exceeded 6253 lb/hr. The interim limit will ensure that such high emissions during those times are eliminated.

B. Increments of Progress: Reporting Milestones

1. What the EPA Proposed

In addition to the proposed 3-year and 1-year emissions limits, the EPA proposed a schedule of milestones that must be achieved to provide assurance that the source is on track to achieve full compliance as expeditiously as practicable and no later than the 3-year deadline.

Those proposed milestones were:

3-month notification: Within 3 months of the EPA's finding, the EPA proposed that GenOn notify the EPA whether it will cease to operate within that period or whether it will continue to operate subject to the emission limitations and compliance schedules in the final rulemaking. If Portland plans to continue to operate subject to these limits, the EPA proposed to require Portland to indicate how it intends to achieve full compliance with the emission limits. Specifically, we proposed that Portland must indicate whether it intends to cease or reduce operation at any emission unit subject to emission limits as its method of compliance with such limits. If this 3-month notice indicated that Portland intends to continue operation, the proposed rule required the remaining reporting requirements also be satisfied.

Modeling protocol and analysis: No later than 3 months from the date of the section 126 finding, we proposed that GenOn submit to the EPA a modeling protocol (including all units at Portland in the protocol), consistent with our Guideline on Air Quality Models. If the EPA identified deficiencies in the modeling protocol submitted by the source, we proposed to require Portland to submit a revision to correct any deficiencies within 15 business days. We proposed to require that Portland submit a modeling analysis in accordance with the approved protocol within 6 months.

Status reports: We proposed to require GenOn to submit, beginning 6 months after the section 126 finding and continuing every 6 months until the final compliance date, a progress report on the implementation of the remedy, including status of design, technology selection, development of technical specifications, awarding of contracts, construction, shakedown, and compliance demonstration.

Interim project report: We proposed to require GenOn to submit within 1 year an interim project report demonstrating compliance with the 1-year limits.

Final project report: We proposed to require GenOn to submit, within 3 years, a final project report which demonstrates compliance with the emission limits in the final rulemaking. We proposed that this final report include the date when full operation of controls was achieved at Portland after shakedown; as well as a minimum of 1 month of CEMS data demonstrating compliance with the emission limits in the final rulemaking.

2. Public Comments and the EPA's Responses

One commenter, GenOn, objected to both the 90-day compliance plan and the periodic status reports. The commenter believed that requiring a detailed plan 90 days after the final rule is unnecessarily restrictive, particularly given that GenOn will not have fully evaluated its compliance options under MATS. Similarly, GenOn believed that detailed status reports are not justified and will limit GenOn's flexibility to revise its compliance strategy in response to other state and federal regulations. Because the regulatory environment is fluid with further changes expected, GenOn expressed concerns that the compliance plan and status reports should not restrict GenOn's ability to revise its strategy for compliance with section 126 as circumstances change.

One commenter believed that the schedule for a required modeling protocol within 3 months was overly ambitious and suggested the owner and operator of Portland should have at least 6 months to submit a modeling protocol for Portland's SO_2 emissions.

3. Final Rule Reporting Milestones

For the final rule, the EPA has amended the proposed requirement for GenOn to develop a compliance plan with an identified remedy with 90 days.

[22] Heat input capacities of 1657.2 and 2511.6 mmBtu/hr are those listed in the title V permit for Portland units 1 and 2.

The EPA agrees with GenOn that it is very possible that complete information to inform this remedy may not be available within 90 days of the rule's effective date. The EPA does, however, believe that in order to implement controls it is reasonable to assume that information necessary for a decision will be available within 12 months of the effective date, and accordingly we have retained the requirement but have postponed the deadline until 12 months after the effective date of the final rule. The EPA acknowledges the commenters' point that there are factors over time that could lead to a revised decision after the 12 month milestone. Even if such factors lead to a different eventual remedy, the EPA believes that it is nonetheless reasonable to require a status report on GenOn's intent at the 12 month point in order to ensure that planned actions for compliance with the requirements of section 126 are on track.

The EPA has also retained the requirements for 6 month status reports. We disagree with comments that these reports are not justified. The status reports required by this rule are warranted not only because section 126 requires ''increments of progress,'' but in addition the EPA believes these are necessary for the EPA and the states to monitor Portland's efforts to achieve compliance with the emission limits established in this rule. The status reports are not exhaustive, but will provide important information to the agency and to the public to monitor Portland's progress towards the ultimate goal of reducing its SO_2 emissions and reducing its impact on New Jersey's compliance with the 1-hour SO_2 NAAQS.

We have also retained the requirement for the interim and final progress reports. For the final rule, we have extended the deadline for the final project report by two months to provide time for evaluation of CEMS data before submitting the report.

In the final rule, we have retained the requirement to submit a modeling protocol and modeling, but, after consideration of the timing concerns raised by commenters, we have amended the deadlines. For the final rule, the modeling protocol is required within 6 months of this rulemaking and the final modeling within 12 months. The revisions to the interim compliance schedule outlined in this section are all logical outgrowths of the compliance schedule originally proposed as they were made in response to consideration of the comments received in response to that proposal.

VII. Alternate Compliance Schedule and Consideration of Petition for Rulemaking for Alternative Emission Limits

In this section, we discuss two additional overarching issues on which we sought comment in the proposal. First we discuss our decision regarding the proposed consideration of an alternative schedule based upon Portland's decision to meet its compliance obligations by electing to shut down unit 1 or unit 2, or both. We then discuss the potential for additional rulemaking to accommodate alternative remedies from those established in this rule.

A. Alternate Compliance Schedule if the Source Owner Opts To Cease Operations

1. What the EPA Proposed

In the preamble to the proposed rule, the EPA discussed why different remedies for meeting the requirements of section 126 may suggest different compliance schedules, 76 FR 19678. In particular, the EPA noted that if GenOn decided to cease operation of the Portland facility, it is possible that implementing such a remedy ''as expeditiously as practicable'' may have different considerations than if it decided to undertake a schedule of constructing and implementing control technologies. Consistent with this perceived possibility, the EPA requested comment in the proposal on how to interpret the phrase ''as expeditiously as practicable'' when the source owner and operator has elected to cease operation as its method of compliance with the emissions limit for a given unit and cessation cannot occur within 3 months of the EPA's finding. The EPA noted that if appropriate based upon comments, the EPA would consider including in the final rule an alternate compliance schedule for this possibility, and the EPA requested comment on relevant factors that should be considered were we to include such an alternate schedule.

2. Public Comments and the EPA's Responses

Comment: One commenter stated that if the facility elected to close, it must be required to cease operation immediately, as there is no basis to allow the plant to continue to significantly contribute to nonattainment and interference with maintenance of the 1-hour SO_2 NAAQS in New Jersey. Another commenter suggested that if Portland plans to cease operations of the coal burning units, shutdown should occur within 3 months of the EPA's final rule.

Response: The EPA notes that section 126(c) of the CAA allows the EPA to permit continued operation beyond 90 days if the source complies with emissions limitations and compliance schedules established by the Administrator. This language does not, however, mandate that any decision to cease operation must occur in any particular time period when the source is otherwise complying with the required emission limits compliance schedules. The EPA disagrees with commenters suggestion that any decision to shutdown must occur immediately or within 90 days. For the final rule, the EPA concludes that the final and interim emission limits and reporting milestones are sufficient for all selected remedies, including a remedy under which GenOn would choose to ultimately cease operation at one or more units. The EPA has made this conclusion because compliance with the interim and final emission limits, regardless of how the plant chooses to comply, results in the elimination of Portland's significant contribution to the affected areas in New Jersey and demonstrates appropriate interim progress towards such elimination.

3. The Final Rule

The EPA has retained the approach in the proposed rule, and we have not included an alternative compliance schedule in the case that the selected remedy is to cease operation of unit 1 and/or unit 2. The EPA did not receive any information in comments that leads the EPA to conclude that a different schedule is necessary.

B. Consideration of Petition for Rulemaking for Alternative Emission Limits

The EPA received comment from GenOn arguing that the unit-specific SO_2 limits for unit 1 and for unit 2 did not provide GenOn with sufficient flexibility. Accordingly, GenOn recommended that the EPA change the form of the final emissions limits to a combined emissions limit for the total emissions from units 1 and 2. In this way, they asserted GenOn would be able to evaluate a broader suite of remedies which could possibly include remedies with equivalent air quality impacts at substantially reduced cost.

The EPA understands the source's request for operational flexibility, and we considered the option suggested by GenOn. However, based on the modeling analysis conducted by the EPA, we are not able to set a combined

limit for the final remedy. The final rule contains individual final limits that are specific to units 1 and 2. There are some combinations of emissions from units 1 and 2 which will be protective of the NAAQS and some that will not. Air quality modeling results indicated that there are many possible scenarios under which a combined limit, of similar stringency to the limits adopted, would lead to exceedances of the 1-hour SO_2 NAAQS. In particular, given the multiple possibilities of available controls for the two units, there would be a large number of possible stack configurations with different dispersion characteristics. While the EPA perhaps could have developed a combined limit with sufficient stringency to ensure that all significant contribution and interference with maintenance would be eliminated under every possible combination of control options and stack configurations, the EPA does not believe that this approach would provide the flexibility that GenOn is seeking because the combined limit would likely need to be much more stringent than the limits in the final rule.

Nevertheless, we acknowledge the greater operating flexibility that an alternative set of emission limits might offer, and we note that in some cases an appropriately constrained combined limit may be possible to construct in a way that is protective of the NAAQS (*e.g.,* more stringent than the sum of the individual limits). Should GenOn wish to have a higher limit at one of the units, in exchange for a lower limit at the other, or seek a combined limit that is protective of the NAAQS in all cases, the source may petition the EPA for additional rulemaking to adopt alternative emissions limits if such petition demonstrates that the proposed alternative would eliminate all emissions at Portland that significantly contribute to nonattainment or interfere with maintenance of the 1-hour SO_2 NAAQS in New Jersey by the 3-year deadline established in this rule. As part of the interim reporting requirements, the rule requires GenOn to submit a modeling analysis, pursuant to a modeling protocol that it is consistent with the data and methods the EPA used to develop this rule, which shows that the final compliance remedy is protective of the NAAQS. If GenOn chooses to submit such a petition, the EPA expects GenOn to provide a demonstration, in the course of conducting the modeling analysis required by the rule, that shows that a specific alternative set of emissions limits for unit 1 and unit 2 would also be protective of the 1-hour SO_2 NAAQS in New Jersey. In order for the EPA to consider such a rulemaking petition, GenOn would need to submit, no later than the 1-year deadline for submitting modeling results under the rule, any proposed alternative limits along with air quality modeling, consistent with the approved modeling protocol, demonstrating that the proposed alternative limits would, at all operating loads, eliminate Portland's significant contribution to nonattainment and interference with maintenance in New Jersey. If the EPA determines it would be appropriate to propose approval of the alternative emission limits, the EPA would conduct a notice and comment rulemaking on the proposed alternative.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action will grant the NJDEP petition and is making a CAA section 126 finding. This type of action is exempt from review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). Under the Paperwork Reduction Act, a ''collection of information'' is defined as a requirement for ''answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *.'' 44 U.S.C. 3502(3)(A). Because the rule applies to a single facility, Portland, the Paperwork Reduction Act does not apply. *See* 5 CFR 1320(c).

C. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this rule will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities because small entities are not subject to the requirements of this rule.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any 1 year. The cost necessary to comply with the limits in this notice are not expected to exceed $100 million. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The requirements for compliance in this rule will be borne by a single, privately owned source.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The rule primarily affects the private industry, and does not impose significant economic cost on state or local governments or preempt state or local law. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with the EPA's policy to promote communications between the EPA and state and local governments, the EPA specifically solicited comment on the proposed action from state and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It does not have a substantial direct effect on one or more Indian Tribes. Furthermore, this action does not affect the relationship between Indian Tribes and the federal government, or distribution of power and responsibilities between the federal government and Indian Tribes. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not involve decisions on environmental health or safety risks that may disproportionately affect children. The EPA believes that the emissions reductions in this rule will further improve air quality and will further improve children's health.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is an exempted action under Executive Order 12866.

I. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the U.S.

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population.

The agency has also reviewed this rule to determine if there is existing disproportionately high and adverse human health or environmental effects on minority or low-income populations that could be mitigated by this rulemaking. An analysis of demographic data illustrates that the population residing near the source is represented by fewer minority and low-income residents than either the surrounding counties, the average demographic composition of the states of New Jersey and Pennsylvania, and national averages. In addition, this rule increases the level of environmental and public health protection for all affected populations since, when fully implemented, it will result in attainment of the health-based 1-hour SO_2 NAAQS. The results of the demographic analysis are presented in the supporting document titled, ''Environmental Justice Assessment for Section 126 Petition from New Jersey Regarding SO_2 Emissions from the Portland Generating Station'' (September 2011), a copy of which is available in the docket EPA–HQ–OAR–2011–0081.

J. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. VCS are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable VCS.

This action does not involve technical standards. Therefore, the EPA did not consider the use of any VCS.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). The EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability. Nonetheless, this action will be effective January 6, 2012.

L. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit Court within 60 days from the date the final action is published in the **Federal Register.** Filing a petition for review by the Administrator of this final action does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review must be final, and shall not postpone the effectiveness of such action.

Thus, any petitions for review of this action related to the section 126 finding must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date final action is published in the **Federal Register.**

List of Subjects in 40 CFR Part 52

Approval and promulgation of implementation plans, Environmental protection, Administrative practice and procedures, Air pollution control, Incorporation by reference, Intergovernmental relations, and Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: October 31, 2011.

Lisa P. Jackson,

Administrator.

For the reasons set forth in the preamble part 52 of chapter I of title 40 of the Code of Federal regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart NN—Pennsylvania

■ 2. Section 52.2039 is added to read as follows:

§ 52.2039 Interstate transport.

The EPA has made a finding pursuant to section 126 of the Clean Air Act (the Act) that emissions of sulfur dioxide (SO_2) from the Portland Generating Station in Northampton County, Upper Mount Bethel Township, Pennsylvania (Portland) significantly contribute to nonattainment and interfere with maintenance of the 1-hour SO_2 national ambient air quality standard (NAAQS) in Morris, Sussex, Warren, and Hunterdon Counties in New Jersey. The owners and operators of Portland shall comply with the requirements in paragraphs (a) through (d) of this section.

(a) The owners and operators of Portland shall not, at any time later than one year after the effective date of the section 126 finding, emit SO_2 (as determined in accordance with part 75 of this chapter) in excess of 6,253 pounds per hour (lb/hr) for unit 1 (identified with source ID 031 in Title V Permit No. 48–0006) and unit 2 (identified with source ID 032 in Title V Permit No. 48–0006) combined;

(b) The owners and operators of Portland shall not, at any time later than three years after the effective date of the section 126 finding, emit SO_2 (as determined in accordance with part 75 of this chapter) in excess of the following limits:

(1) 1,105 lb/hr and 0.67 pounds per million British Thermal Unit (lb/mmBtu) for unit 1; and

(2) 1,691 lb/hr and 0.67 lb/mmBtu for unit 2.

(c) The owners and operators of Portland shall comply with the following requirements:

(1) Perform air modeling to demonstrate that, starting no later than three years after the effective date of the section 126 finding, emissions from Portland will not significantly contribute to nonattainment or interfere with maintenance of the 1-hour SO_2 NAAQS in New Jersey, in accordance with the following requirements:

(i) No later than six months after the effective date of the section 126 finding, submit to the EPA a modeling protocol that is consistent with the EPA's Guideline on Air Quality Models, as codified at 40 CFR Part 51, Appendix W, and that includes all units at the Portland Generating Station in the modeling.

(ii) Within 15 business days of receipt of a notice from the EPA of any deficiencies in the modeling protocol under paragraph (d)(1)(i) of this section, submit to the EPA a revised modeling protocol to correct any deficiencies identified in such notice.

(iii) No later than one year after the effective date of the section 126 finding, submit to the EPA a modeling analysis, performed in accordance with the modeling protocol under paragraphs (c)(1)(i) and (c)(1)(ii) of this section, for the compliance methods identified in the notice required by paragraph (c)(2) of this section.

(2) No later than one year after the effective date of the section 126 finding, submit to the EPA the compliance method selected by the owners and operators of Portland to achieve the emissions limits in paragraph (b) of this section.

(3) Starting six months after the effective date of the section 126 finding and continuing every six months until three years after the effective date of the section 126 finding, submit to the EPA progress reports on the implementation of the methods to achieve compliance with emissions limits in paragraphs (a) and (b) of this section, including status of design, technology selection, development of technical specifications, awarding of contracts, construction, shakedown, and compliance demonstrations as applicable. These reports shall include:

(i) An interim project report, no later than one year after the effective date of the section 126 finding, that demonstrates compliance with the emission limit in paragraph (a) of this section.

(ii) A final project report, submitted no later than 60 days after three years after the effective date of the section 126 finding, that demonstrates compliance with the emission limits in paragraph (b) of this section and that includes at least one month of SO_2 emission data from Portland's continuous SO_2 emission monitor, and that includes the date when full operation of controls was achieved at Portland after shakedown.

(4) The requirements in paragraphs (c)(1) and (c)(3) of this section shall not apply if the notice required by paragraph (c)(2) of this section indicates that the owners and operators of Portland have decided to completely and permanently cease operation of unit 1 and unit 2 as the method of compliance with paragraphs (a) and (b) and with section 126 of the Act.

(d) Compliance with the lb/mmBtu limitations in paragraph (b) of this section is determined on a 30 boiler operating day rolling average basis. Boiler operating day for the purposes of this paragraph means a 24-hour period between midnight and the following midnight during which any fuel is combusted in the units identified in paragraph (a) of this section.

[FR Doc. 2011–28816 Filed 11–4–11; 8:45 am]

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FEDERAL REGISTER

Vol. 76 Monday,
No. 215 November 7, 2011

Part VIII

The President

Proclamation 8751—Veterans Day, 2011

Federal Register
Vol. 76, No. 215
Monday, November 7, 2011

Presidential Documents

Title 3—

The President

Proclamation 8751 of November 3, 2011

Veterans Day, 2011

By the President of the United States of America

A Proclamation

Today, our Nation comes together to honor our veterans and commemorate the legacy of profound service and sacrifice they have upheld in pursuit of a more perfect Union. Through their steadfast defense of America's ideals, our service members have ensured our country still stands strong, our founding principles still shine, and nations around the world know the blessings of freedom. As we offer our sincere appreciation and respect to our veterans, to their families, to those who are still in harm's way, and to those we have laid to rest, let us rededicate ourselves to serving them as well as they have served the United States of America.

Our men and women in uniform are bearers of a proud military tradition that has been dutifully passed forward—from generation to generation—for more than two centuries. In times of war and peace alike, our veterans have served with courage and distinction in the face of tremendous adversity, demonstrating an unfaltering commitment to America and our people. Many have made the ultimate sacrifice to preserve the country they loved. The selflessness of our service members is unmatched, and they remind us that there are few things more fundamentally American than doing our utmost to make a difference in the lives of others.

Just as our veterans stood watch on freedom's frontier, so have they safeguarded the prosperity of our Nation in our neighborhoods, our businesses, and our homes. As teachers and engineers, doctors and parents, these patriots have made contributions to civilian life that serve as a testament to their dedication to the welfare of our country. We owe them a debt of honor, and it is our moral obligation to ensure they receive our support for as long as they live as proud veterans of the United States Armed Forces. This year, as our troops in Iraq complete their mission, we will honor them and all who serve by working tirelessly to give them the care, the benefits, and the opportunities they have earned.

On Veterans Day, we pay tribute to our veterans, to the fallen, and to their families. To honor their contributions to our Nation, let us strive with renewed determination to keep the promises we have made to all who have answered our country's call. As we fulfill our obligations to them, we keep faith with the patriots who have risked their lives to preserve our Union, and with the ideals of service and sacrifice upon which our Republic was founded.

With respect for and in recognition of the contributions our service members have made to the cause of peace and freedom around the world, the Congress has provided (5 U.S.C. 6103(a)) that November 11 of each year shall be set aside as a legal public holiday to honor our Nation's veterans.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim November 11, 2011, as Veterans Day. I encourage all Americans to recognize the valor and sacrifice of our veterans through appropriate public ceremonies and private prayers. I call upon Federal, State, and local officials to display the flag of the United States and to participate in patriotic activities in their communities. I call on

all Americans, including civic and fraternal organizations, places of worship, schools, and communities to support this day with commemorative expressions and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this third day of November, in the year of our Lord two thousand eleven, and of the Independence of the United States of America the two hundred and thirty-sixth.

[FR Doc. 2011–28997
Filed 11–4–11; 11:15 am]
Billing code 3295–F2–P

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FEDERAL REGISTER PAGES AND DATE, NOVEMBER

CFR PARTS AFFECTED DURING NOVEMBER

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